(18,863.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 233.

ELMIRA KNEPPER

vs.

JOHN A. SANDS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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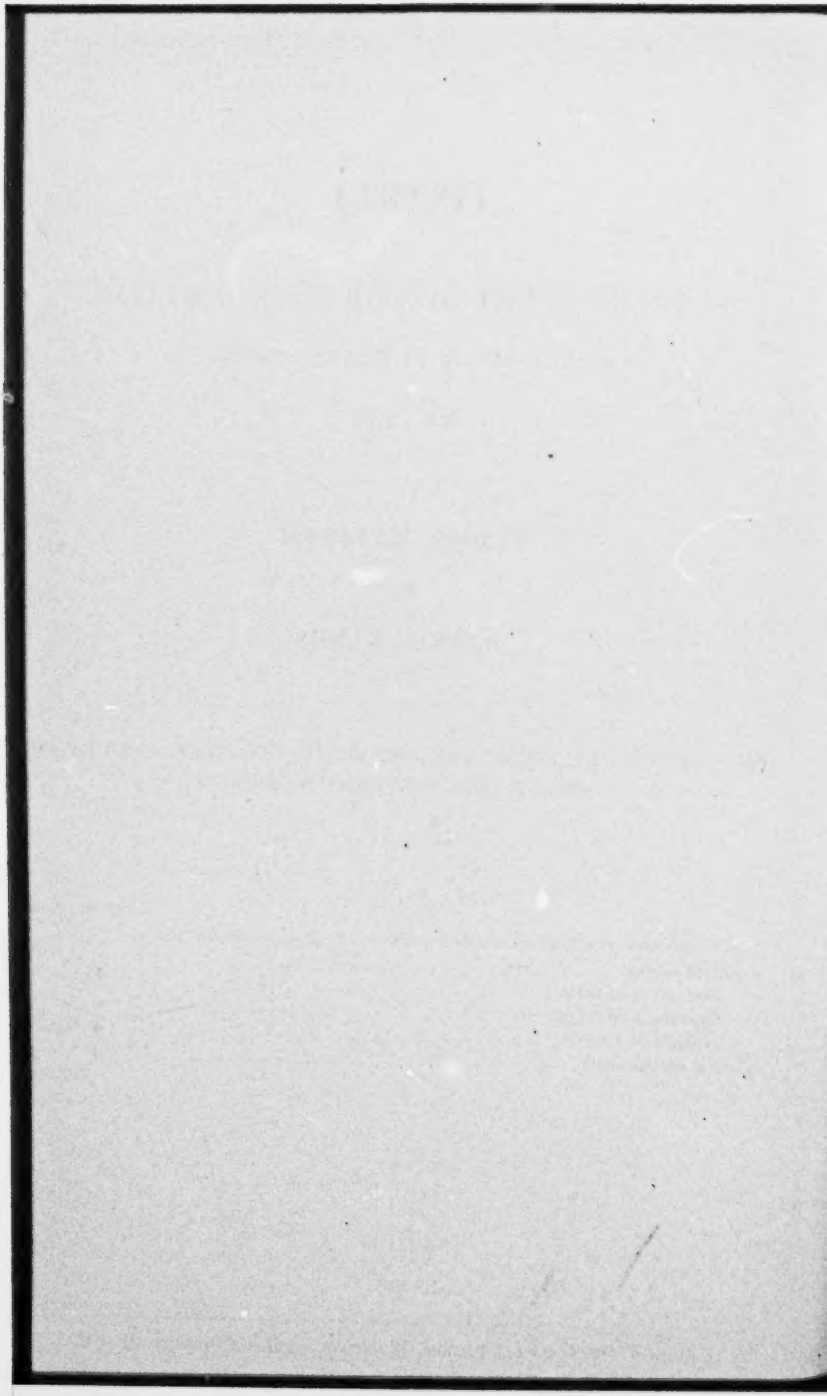
JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 21, 1903.



1 United States Circuit Court of Appeals, Eighth Circuit.

ELMIRA KNEPPER, Appellant,
vs.
JOHN A. SANDS, Appellee.
} Appeal from the Circuit Court of the United States for the Northern District of Iowa.

The United States circuit court of appeals for the eighth circuit, sitting at the city of St. Louis, Missouri on the 25th day of February, 1903, certifies that from the record on file in the above entitled cause, which is pending in this court on an appeal duly taken to review a decree rendered in said action in favor of John A. Sands, the appellee, and is undetermined, the following facts are made to appear:

That by an act of Congress approved May 12, 1864 it was "enacted in the Senate and House of Representatives of the United States of America, * * * that there be, and is hereby granted, to the State of Iowa, for the purpose of aiding in the construction of a railroad from Sioux City, in said State, to the south line of the State of Minnesota, at such points as the said State of Iowa may select between the Big Sioux and the West fork of the Des Moines river; also to said State for the use and benefit of the McGregor Western Railroad Company, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said State, in a westerly direction, by the most practicable route on or near the forty-third parallel of north latitude until it shall intercept the said road running from Sioux City to the Minnesota State line, in the county of O'Brien in said State, every alternate section of land designated by odd numbers for ten sections in width on each side of said road, but, in case
2 it shall appear that the United States have, when the lines or routes of said roads are definitely located, sold any section or part thereof granted as aforesaid or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement, or pre-emption has attached, as aforesaid, which lands thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by the State of Iowa for the uses and purposes aforesaid: Provided, that the lands so selected shall in no case be located more than twenty miles from the lines of said roads: Provided further, that any and all lands heretofore reserved to the United States by an act of Congress, or in any manner by competent authority for the pur-

pose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the routes of said roads through such reserved lands, in which case the right of way shall be granted, subject to the approval of the President of the United States.

* * * * * * *

SEC. 4. And be it further enacted, That the lands hereby granted shall be subject to the disposal of the legislature of Iowa, for the purposes aforesaid, and no other. And the said railroads shall be, and remain, public highways for the use of the Government of the United States.

SEC. 4. And be it further enacted, That the lands hereby granted shall be disposed of by said State, for the purposes aforesaid only, and in manner following, namely: When the governor of said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of either of said roads is completed in a 3 good, substantial, and workmanlike manner, as a first-class railroad, then the Secretary of the Interior shall issue to the State, patents for one hundred sections of land for the benefit of the road having completed the ten miles as aforesaid. When the governor of said State shall certify that another section of ten consecutive miles shall have been completed as aforesaid, then the Secretary of the Interior shall issue patents to said State in like manner, for a like number; and when certificates of the completion of additional sections of ten consecutive miles of either of said roads are, from time to time, made as aforesaid, additional sections of land shall be patented as aforesaid, until said roads, or either of them, are completed, when the whole of the lands hereby granted shall be patented, to the State for the uses aforesaid, and none other, provided, that if the said McGregor Western Railroad Company, or assigns shall fail to complete at least twenty miles of its said road during each and every year from the date of its acceptance of the grant provided for in this act, then the State may resume said grant, and so dispose of the same as to secure the completion of a road on said line and upon such terms, within such time as the State shall determine; provided further, that if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the State of Iowa for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms as the State shall determine; and provided further, that said lands shall not in any manner be disposed of or incumbered except as the same are patented under the provisions of this act, and should the State fail to complete said roads within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States.

SEC. 5. And be it further enacted, That as soon as the governor of said State of Iowa shall file or cause to be filed with the Secretary

of the Interior maps designating the routes of said roads, then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act."

* * * * * * *

4 That on April 3, 1866 the State of Iowa accepted said grant and on the same day, by appropriate legislative action, conferred that part of the grant made in aid of the construction of a railroad from Sioux City to the south line of the State of Minnesota, upon the Sioux City & St. Paul Railroad Company, a corporation duly organized and existing under and by virtue of the laws of said State, said grant being made upon the terms, conditions and restrictions contained in the aforesaid act of Congress; that the said railroad company accepted said grant from the State and entered upon the construction of its road but only completed five sections of ten miles each, extending from the Minnesota State line southward to the town of Le Mars and received from the State of Iowa the amount of land it was entitled to by reason of the construction of such part of its road; that in a message to the legislature of the State of Iowa, delivered in January 1882, the governor of the State directed the attention of the legislature to the fact that the railroad company aforesaid had failed to complete its road in accordance with the terms of the grant and advised the legislature of his refusal to convey any more lands to said railroad company because it had received all the land that it was entitled to and recommended that appropriate legislative action be taken; that thereafter, on March 16, 1882, the following act was adopted by the legislature of the State of Iowa, which was duly approved by the governor:

"An act to resume all the lands and rights conferred upon the Sioux City & St. Paul Railroad Company by or under an act of Congress approved May 12, A. D. 1864, to lands not heretofore earned by said company.

Whereas, by an act of Congress approved May 12, 1864, entitled, 'An act for a grant of lands to the State of Iowa, in alternate sections to aid in the construction of a railroad in said State,' certain lands were granted to the State of Iowa for the purpose of aiding in the construction of a railroad from Sioux City in said State, to the south line of Minnesota, at such point as the said State might select between the Big Sioux and the West fork of the Des Moines river, which grant was made to and accepted by, the State of Iowa

5 upon the conditions, restrictions and qualifications therein named, and

Whereas, by an act of the General Assembly of the State of Iowa, approved April 3, 1866, so much of the lands, interests, rights, powers and privileges as were or might be conferred in pursuance of said acts of Congress, to aid in the construction of the aforesaid road, were disposed of, granted and conferred upon the Sioux City & St. Paul Railroad Company, and

Whereas, said Sioux City & St. Paul Company, duly accepted said grant on the 20th day of September, A. D., 1866, but has failed to complete or cause to be completed any road on the line adopted therefor, from Sioux City to Le Mars, in said State of Iowa, or any road in lieu thereof.

Be it enacted by the General Assembly of the State of Iowa:

SEC. 1. That all lands, and all rights to lands, granted or intended to be granted to the Sioux City & St. Paul Railroad Company by the said acts of Congress and of the General Assembly of the State of Iowa, which have not been earned by said railroad company by a compliance with the conditions of said grant, be, and the same are hereby absolutely and entirely resumed by the State of Iowa, and that the same be and are absolutely vested in said State as if the same had never been granted to said railroad company.

SEC. 2. This act being deemed of immediate importance shall take effect and be in force from and after its publication in the Iowa State Register and the Sioux City Journal newspaper- published in the State of Iowa.

Approved March 16, 1882."

That thereafter by an act of the legislature of the State of Iowa, which took effect April 2, 1884, the State relinquished to the United States all of its right, title and interest in the lands pertaining to the grant in aid of the Sioux City & St. Paul Railroad Company, which had been declared vested in the State by virtue of the act aforesaid, approved on March 16, 1882, and authorized the governor of the State to certify, to the Secretary of the Interior, a list of
6 all lands which had been heretofore patented to the State to aid in the construction of the Sioux City & St. Paul Railroad Company, which lands had not been earned and had been declared forfeited to the State; but said act contained the provision "that nothing in this (act) contained shall be construed to apply to lands situated in counties of Dickinson and O'Brien."

It further appears that prior to the adoption of the act of March 16, 1882 the State of Iowa, acting through its executive officers, had caused a computation to be made of the lands to which the Sioux City & St. Paul Railroad Company was entitled under the grant aforesaid and of the lands patented to the State on that account and of the lands actually conveyed by the State to said company and also caused a computation to be made of the lands pertaining to the grant and held by the State, which had neither been conveyed to the railroad company or earned by it and that upon such computation it appeared that said railroad company had received conveyances from the State for 322,412–81/100 acres of land, which was all that it was entitled to according to the terms of the grant and that the State still held the legal title to 85,457–41/100 acres of land pertaining to said grant, no part of which had at that time been earned by the railroad company or conveyed to it or has ever since been earned; that the last named quantity of land so unearned and unconveyed consisted in part of the tract of land in controversy in

this action, to-wit, section 9, township 95, north of range 42, west of the fifth principal meridian, situated in O'Brien county, Iowa.

It further appears that the tract of land in controversy remained open and unoccupied until about one year subsequent to the passage of what is termed the relinquishment act aforesaid of April 2, 1884, at which time it was settled upon by John A. Sands, the appellee, who erected a house and made improvements thereon of the value of $1750., with a view of establishing a homestead in accordance with the laws of the United States and who has ever since resided upon said land, claiming it as a homestead; that he made an application to the proper land office to enter it as a homestead,
7 some time in the year 1884 but his application was rejected, and that he renewed such application on March 10, 1896, after the Secretary of the Interior, in a published circular of date November 18, 1895, had declared the land in controversy, and other like land, subject to disposal by the Land Department of the United States.

It further appears that when his last application to enter the land was made, his claim was contested in the local land office by Elmira Knepper, the appellant in this case; that said Elmira Knepper asserted a right to the land in virtue of a purchase of the same by her from the Sioux City & St. Paul Railroad Company, which was made on June 21, 1887, and in virtue of the provisions of the fourth section of the act of Congress making provision for the adjustment of railroad land grants and other purposes, which was approved March 3, 1887 (*vide* 24 St. 556, c. 376); that the said Elmira Knepper had never, at any time, resided upon the land in controversy or cultivated the same or in any manner attempted to comply with the homestead laws of the United States for the purpose of obtaining a title to it thereunder; that the controversy thus inaugurated as aforesaid between the parties to this action, was tried and determined before the register and receiver of the local land office and resulted in a finding, by such officer, that John A. Sands, the appellee, by virtue of his settlement upon the land and continued residence thereon and cultivation thereof and his full compliance with the homestead laws of the United States, was entitled to a patent to said lands from the United States; that an appeal was taken from such decision by Elmira Knepper to the Commissioner of the General Land Office, who, on July 20, 1899, likewise decided that John A. Sands, the appellee, was entitled to a patent for said land; that a further appeal was taken, by Elmira Knepper, to the Secretary of the Interior, who, on April 24, 1900, reversed the decision of the register and receiver and also the decision of the Commissioner of the General Land Office and thereupon rejected the application of said Sands to enter the land as a homestead; that at the time the bill of complaint was filed in the present case by John A. Sands against Elmira Knepper, the officers of the General
8 Land Office, acting in accordance with the decision of the Secretary of the Interior, were about to issue or had already issued a patent for the land in controvey to the said Elmira Knep-

per, solely in virtue of her alleged purchase of the land from the Sioux City & St. Paul Railroad Company on June 21, 1887, and in virtue of the fourth section of the adjustment act of March 3, 1887.

It further appears from the bill of complaint that John A. Sands, the appellee, alleged that the action aforesaid, if taken, would be unlawful and contrary to law, wherefore he prayed that the Commissioner of the General Land Office should be required to accept his proofs showing settlement upon and continuous cultivation of the land for the period of five years or more and that the patent to said land allowed to the defendant, Elmira Knepper, be either declared null and void or for a decree declaring that the defendant holds the legal title in trust for the appellee.

And the said circuit court of appeals for the eighth circuit further certifies that the following questions of law, among others, arise and are presented by the assignment of errors in this case; that the decision thereof is indispensable to a correct decision of the cause; and that to that end it desires the instruction of the Supreme Court upon the following questions and propositions of law, to-wit:

First. In view of the provisions of the act of Congress of May 12, 1864, by virtue of which the land in controversy was granted to the State of Iowa, did the action which was subsequently taken in manner and form aforesaid, by the governor and legislature of the State of Iowa, operate as a final adjustment of the grant so far as the Sioux City & St. Paul Railroad Company was concerned and by virtue of its being so adjusted, exempt or except the grant in question from the provisions of the adjustment act of March 3, 1887?

Second. In view of the terms of the granting act of May 12, 1864, and the action subsequently taken in manner and form aforesaid by the State of Iowa, acting through its governor and legislature, can Elmira Knepper, the appellant, be esteemed a purchaser in good faith or a *bona fide* purchaser of the land in controversy, within the meaning of the fourth section of the adjustment act of
9 March 3, 1887, as against John A. Sands, the appellee, who was in the open possession of the land in controversy and had erected valuable improvements thereon in manner and form aforesaid when said purchase was made?

In witness whereof the undersigned judges, holding the said United States circuit court of appeals for the eighth circuit, have hereunto set their hands this 25th day of February, A. D., 1903, at St. Louis, Missouri, and ordered that the foregoing certificate be filed in said United States circuit court of appeals and by the clerk of said court duly forwarded to the Supreme Court of the United States.

HENRY C. CALDWELL,
WALTER H. SANBORN,
AMOS M. THAYER,
Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

10 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordon, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing certificate in the case of Elmira Knepper, appellant, *vs.* John A. Sands, appellee, No. 1751, December term, A. D. 1902, was duly filed and entered of record in my office by order of said circuit court of appeals and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, this twenty-fifth day of February, A. D. 1903.

JOHN D. JORDAN,
Clerk United States Circuit Court of Appeals for the Eighth Circuit.

11 [Endorsed:] U. S. circuit court of appeals eighth circuit. December term, 1902 No. 1751 Elmira Knepper, appellant, *vs.* John A. Sands. Certificate of questions to the Supreme Court of the United States. Filed Feb. 25 1903 John D. Jordan, clerk.

Endorsed on cover: (Certificate.) File No. 18,863. U. S. C. C. of appeals, 8th circuit. Term No. 233. Elmira Knepper *vs.* John A. Sands. Filed March 13", 1903.

IN THE SUPREME COURT OF THE UNITED STATES

MAY TERM, 1903.

ELMIRA KNEPPER, APPELLANT,

vs.

JOHN A. SANDS, APPELLEE.

PETITION FOR WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT TO CERTIFY TO THE SUPREME COURT FOR ITS DETERMINATION THE CASE OF ELMIRA KNEPPER, APPELLANT VS. JOHN A. SANDS, APPELLEE.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES.

1. The petition of Elmira Knepper respectfully shows to this honorable court that in the cause above entitled on the 18th day of March, 1901, there was filed in the office of the clerk of the United States Circuit court in and for the Northern district of Iowa the Bill in Equity of the appellee, John A. Sands, which said bill is found on page one of the certified transcript of the proceedings in said cause, which is hereto attached and made a part hereof.

2. That on the 6th day of May, 1901, there was filed in the office of the clerk of the Circuit court in and for said district the demurrer of appellant to the bill of appellee, which said demurrer is found on page 31 of the certified transcript of the proceedings in said cause, which is attached hereto and made a part hereof.

3. That on the 30th and 31st days of August, 1901, said cause was submitted to the Circuit court of the United States in and for said district upon the bill and demurrer filed in said cause and by the said court taken under advisement.

4. That on the 6th day of September, 1901, there was filed in the office of the clerk of said court the opinion of

the court in said cause, and afterwards on said 6th day of September, 1901, and first day of October, 1901, an order and judgment by said court were made overruling the demurrer of appellant, said opinion and order and judgment being found on pages 33 and 50 respectively of the certified transcript of the record in said cause hereto attached and made a part hereof.

5. That on the second day of December, 1901, there was filed in the office of the clerk of said Circuit court the election in writing of the appellant not to plead further in said cause but to stand upon the demurrer filed in said cause, said election being found on page 50 of the certified transcript of the proceedings in said cause hereto attached.

6. That on the 10th day of December, 1901, a decree was entered in said cause on page 135 of volume 3 of the records of said court granting the prayer in the bill of appellee and granting judgment against the appellant for the costs of said action, said decree being found on page 51 of the certified transcript of the proceedings in said cause hereto attached.

7. That the appellant duly excepted at the time to the various rulings, orders and decrees of said court rendered in favor of the appellee.

8. That on the 17th day of March, 1902, there was filed in the office of the clerk of said court the petition of appellant for appeal, an assignment of errors and bond for costs, said petition, assignment and bond being found on page 52 of the certified transcript of the proceedings in said cause hereto attached.

9. That said appeal was on the 15th day of March, 1902, allowed by the Hon. O. P. Shiras, Judge of said court.

10. That notice of said appeal was served on the appellee on the 19th day of March, 1902, and that on April 28, 1902, a duly certified transcript of the record in said cause, together with the original citation and return thereon, was filed in the office of the clerk of the Circuit Court of Appeals of the United States for the Eighth district.

11. That on the 11th day of December, 1902, said cause was submitted in said Circuit Court of Appeals of the United States for the Eighth district, after argument by counsel for appellant and appellee.

12. That on the 25th day of February, 1903, the said Circuit Court of Appeals certified certain questions to the Supreme Court of the United States, said order and ques-

tions certified being found on page 62 of the certified transcript of the proceedings in said cause hereto attached.

13. A certified copy of the entire record of said cause in said Circuit Court of Appeals is herewith furnished as part of this application in conformity with rule 37 of this honorable court relative to cases from Circuit Court of Appeals.

14. Your petitioner further represents that the present case is one in which it is proper for this court to issue a writ of certiorari, for the following reasons, among others:

I. Because the questions of law involved herein have not been passed on by this court.

II. Because the public interests and the interests of jurisprudence require the decision of this court upon the questions of law involved herein.

III. Because, in view of the large number of persons holding land under and by virtue of the grant to the state of Iowa for the railroad named therein, and because of the uncertainty to the title of said lands, said questions are of sufficient general and material importance and interest as to make it necessary that they should be determined by the court of last resort.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Eighth circuit, commanding the said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals, in said cause therein entitled Elmira Knepper, appellant vs. John A. Sands, appellee No. 1751, to the end that said cause may be reviewed and determined by this court as provided in section 6 of the act of congress, entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891.

ELMIRA KNEPPER,

By J. S. Struble

Petitioner's attorney.

STATE OF IOWA, }
Plymouth County, } ss.

I, I. S. Struble, being duly sworn on my oath do depose and say that I am the attorney for the appellant in the

above entitled cause, that I have read the foregoing petition and that the same is true to the best of my knowledge and belief, my knowledge being derived from the record in said cause and from what has taken place in my presence and hearing in the court in which this action has been heard.

J. D Struble

Sworn to before me this 21st day of May, 1903.

(Seal) D J Struble

Notary Public in and for said County and State.

I hereby certify that I have examined the foregoing petition, and in my opinion the petition is well founded, and that the case is one in which the prayer of the petitioner should be granted. J D Struble

Counsel for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

In the Matter of the Petition of Elmira Knepper for a Writ of Certiorari directed to the Circuit Court of Appeals for the Eight district, to bring before the Supreme Court the case of

Elmira Knepper, Appellant

vs.

John A. Sands, Appellee.

To Messrs. J. H. King and M. B. Davis,
Counsel for Appellee:

Please take notice that upon a certified copy of the transcript of the record herein and upon the annexed petition of Elmira Knepper sworn to the 21st day of May, 1903, I shall move the motion hereto annexed before the Supreme court of the United States at the capitol in the city of Washington, District of Columbia, on the 1st day of June 1903, at the opening of the court on that day, or as soon thereafter as counsel can be heard, and that I shall then and there move for such further relief in the premises as may be just.

Dated at LeMars, Iowa, May 21, 1903.

J. D. Struble

Counsel for the Appellant.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

In the Matter of the Petition of Elmira Knepper for a writ of certiorari directed to the Circuit Court of Appeals, for the Eight District, to bring before the Court the case of

Elmira Knepper, Appellant
vs.
John A. Sands Appellee.

And now comes the appellant above named, by I. S. Struble, her counsel and attorney, and moves this Court, upon a certified copy of the transcript of the record herein, and upon the annexed petition sworn to, for a writ of certiorari directed to the Circuit Court of Appeals for the Eighth Circuit to bring before this Honorable Court the case of Elmira Knepper, appellant, against John A. Sands, appellee, in which said cause certain questions have been certified to this court by said circuit court of appeals, for such proceedings therein as to this court may seem just; and for such other relief in the premises as may be just.

I. S. Struble

Counsel and Attorney for Appellant.

POOR COPY

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Appearance for Appellant.....

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1902, of said Court begun and held at the United States Court House in the City of St. Louis, Missouri, on the first Monday of December, A. D., 1902, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn and Honorable Amos M. Thayer, Circuit Judges:

Attest.

Seal of United States Circuit Court of Appeals Eighth Circuit.

John D. Jordan,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit

Be it remembered that heretofore, to-wit: on the twenty-third day of April A. D., 1903, a transcript of record, pursuant to an appeal allowed by the Circuit Court of the United States for the Northern District of Iowa, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Elmira Knepper was Appellant and John A. Sands was Appellee, which said transcript of record is in the words and figures following; to-wit:

Plans and proceedings in the United States
Circuit Court of Appeals for the Eighth Circuit,
at the December Term, 1902, of said Court begun
and held at the United States Court House in the
City of St. Louis, Missouri, on the first Mon-
day of December, A. D., 1902, before the Hon-
orable Henry C. Caldwell, Honorable Walter H.
Sanborn and Honorable Amos M. Thayer, Circuit
Judges.

Attest.

Seal of United States Circuit Court of Appeals Eighth Circuit.

John B. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

The following transcript of record is in the words and figures following, to-wit:

In the Circuit Court of the United States for the Northern District of Iowa, Central Division.

In Equity.

No. 1.

Bill of Complaint.

Filed April 21, 1902.

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Iowa, Central Division:

Your orator, John A. Brush, a citizen of the State of Ohio, and a resident of Columbus, in said State, brings this his bill of complaint against Thomas Carroll, a citizen of the State of Iowa, and a resident of Fort Dodge, in the Northern District of Iowa, and against Charles Ellis

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

No. 1751.

ELMIRA KNEPPER, APPELLANT,

vs.

JOHN A. SANDS, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

FILED APRIL 28, 1902.

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1 The United States of America,
Northern District of Iowa—ss.

Pleas before the Circuit Court of the United States in and for the Northern District of Iowa, Western Division, at a term begun and holden at Sioux City in said District on the second Tuesday in October, 1900, before Hon. O. P. Shiras, Judge of the Northern District of Iowa.

John A. Sands, Complainant,
No. 199. vs.. Equity.
Elmira Knepper, Respondent.

Be it remembered, that heretofore to wit on the 18th day of March 1901, there was filed in the office of the Clerk of the United States Circuit Court in and for the Northern District of Iowa, a Bill in Equity in the above entitled cause, which Bill is in words and figures as follows, to wit:

2 In the Circuit Court of the Northern District of Iowa, Western Division, in and for the Eighth Judicial Circuit.

John A. Sands, Plaintiff,
vs.
Elmira Knepper, Defendant.

To the Honorable United States Circuit Court, holding in equity, the plaintiff states as follows:

First. That he is a citizen of the United States over the age of twenty-one years, residing in the County of O'Brien, and State of Iowa, and has a homestead right under the laws of the United States and brings this suit in his own right.

Second. The defendant is a citizen of the United States and a resident of O'Brien County, State of Iowa.

Third. The legal question herein presented and under which the plaintiff claims his right, involves the construction of the United States Statutes, especially of the land granting Act of May 12, 1864, granting certain lands to the State of Iowa, to secure the building of the railroad from Sioux City to the Minnesota State line and the disposal, resumption, adjustment, and forfeiture of said land under said grant, and by authority conferred in said grant, and also the construction of the disposal of said land to homesteaders under the public land laws of the United States and also the rights of disposal

of said lands by the United States under the Act of March 3d, 1887, to purchasers claiming to have purchased from the Sioux City and St. Paul Railway Company and now claiming the same as against the plaintiff by reason of the fourth section of the Act of March 3rd, 1887, and the questions arising by virtue of all of the above enumerated statutes and laws of the United States, and others incident thereto.

The value of the property herein claimed by the plaintiff is Eight thousand dollars ($8,000.00).

3 The plaintiff represents to the Court as follows:

That by an Act of Congress, approved May 12, 1864, the following grant of land was made to the State of Iowa, in alternate sections:

An Act for a grant of land to the State of Iowa in alternate sections, to aid in the construction of a railroad in said State.

Be it enacted in the Senate and House of Representatives of the United States of America, in Congress assembled, that there be, and is hereby granted to the State of Iowa, for the purpose of aiding in the construction of a railroad from Sioux City, in said State, to the south line of the State of Minnesota, at such points as the said State of Iowa may select between the Big Sioux and the West Fork of the Des Moines River; also to said State for the use and benefit of the McGregor Western Railroad Company, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said State, in a westerly direction, by the most practicable route on or near the forty-third parallel of North Latitude until it shall intercept the said road running from Sioux City to the Minnesota State line, in the County of O'Brien in said State, every alternate section of land designated by odd numbers for ten sections in width on each side of said road, but, in case it shall appear that the United States have, when the lines or routes of said roads are definitely located, sold any section or part thereof granted as aforesaid or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement, or pre-emption has attached,

as aforesaid, which lands thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by the State of Iowa for the uses and purposes aforesaid; Provided, That the lands so selected shall in no case be located more than twenty miles from the lines of said roads; Provided further, That any and all lands heretofore reserved to the United States by an act of Congress, or in any other manner by competent authority for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the routes of said roads through such reserved lands, in which case the right of way shall be granted, subject to the approval of the President of the United States.

Sec. 2. And be it further enacted, that the sections and parts of sections of land which by such grant shall remain to the United States within ten miles on each side of said roads shall not be sold for less than double the minimum price of public lands when sold nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder at or above the minimum price as aforesaid; Provided, That actual bona fide settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement and occupation, as now provided by law, purchase the same at the increased minimum price; And Provided Also, that settlers under the provisions of the homestead law, who comply with the terms and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding.

4 Sec. 3. And Be it Further Enacted, That the lands hereby granted shall be subject to the disposal of the legislature of Iowa, for the purposes aforesaid and no other. And the said railroads shall be, and remain public highways, for the use of the government of the United States, free of all toll or other charges upon the transportation of any property or troops of the United States.

Sec. 4. And be it further enacted, That the lands hereby granted shall be subject to the disposal of the legislature of Iowa, for the purposes aforesaid, and no other. And the said railroads shall be, and remain, public highways for the use of the government of the United States.

Sec. 4. And Be it Further Enacted, That the lands hereby granted shall be disposed of by said State, for the purposes aforesaid only, and in manner following, namely: When the governor of said State shall certify to the Secretary of the

Interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial, and workmanlike manner, as a first-class railroad, then the Secretary of the Interior shall issue to the State, patents for one hundred sections of land for the benefit of the road having completed the ten miles as aforesaid. When the governor of said State shall certify that another section of ten consecutive miles shall have been completed as aforesaid, then the Secretary of the Interior shall issue patents to said State in like manner, for a like number; and when certificates of the completion of additional sections of ten consecutive miles of either of said roads are, from time to time, made as aforesaid, additional sections of lands shall be patented as aforesaid, until said roads, or either of them, are completed, when the whole of the lands hereby granted shall be patented, to the State for the uses aforesaid, and none other, Provided, That if the said McGregor Western Railroad Company, or assigns shall fail to complete at least twenty miles of its said road during each and every [—] from the date of its acceptance of the grant provided for in this act, then the State may resume said grant, and so dispose of the same as to secure the completion of a road on said line and upon such terms, within such time as the State shall determine; Provided Further, That if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the State of Iowa for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms as the State shall determine; And Provided Further, that said lands shall not in any manner be disposed of or incumbered except as the same are patented under the provisions of this act, and should the state fail to complete said roads within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States.

Sec. 5. And Be it Further Enacted, That as soon as the Governor of said State of Iowa shall file or cause to be filed with the Secretary of the Interior maps designating the routes of said roads, then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act.

Sec. 6. And be it further enacted, That there be, and is hereby granted to the State of Minnesota, for the purpose of aiding in the construction of a railroad from St. Paul and St. Anthony via Minneapolis, to a convenient point of junction west of the Mississippi, to the southern boundary of the State, in the direction of the [Mount] of the Big Sioux River, four additional alternate sections of land per mile, to be selected upon

the same conditional restrictions and limitations, as are contained in the act of Congress entitled "An Act making a grant of land to the Territory of Minnesota, in alternate sections to aid in the construction of certain railroads in said territory and granting public lands, in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State," approved March third, eighteen hundred and fifty-seven; Provided, That the land to be so located by virtue of this section may be selected within twenty miles of the line of said road, but in no case at a greater distance therefrom.

Approved May 12, 1864.

Fourth. That on the third day of April, 1866, the State of Iowa duly accepted said grant, and on the same day conferred that portion made in aid of the construction of the said road from Sioux City to the South line of the State of Minnesota, upon the Sioux City and St. Paul Railroad Company, a corporation duly organized and existing under and by virtue of the laws of said State, said grant to said railroad company being made upon the terms, conditions and restrictions contained in the aforesaid acts of Congress.

Fifth. That said railroad company accepted said grant and entered upon the construction of said road and completed five sections of ten miles each of said road from the Minnesota State line southward and received from the State of Iowa the amount of land the company was entitled to by reason of said construction under said grant.

Sixth. That in his second bi-ennial message to the Iowa Legislature, in January, 1862, the Governor of the State of Iowa, called the attention of the legislature thereof to the failure of said railroad company to complete said road in accordance with the terms of the grant and informed the Legislature of his refusal to convey any more lands to the Railroad Company, because it had already received all the land it had earned, recommending action to be taken by the Legislature thereon in the following language:

"On May 12, 1864, Congress granted to this State certain lands to aid in the construction of a railroad from Sioux City to the south line of the State of Minnesota, at such point as the State should select between the "Big Sioux" and the "West fork of the Des Moines River." This grant was designed to aid in constructing a line from Sioux City to St. Paul, and was a virtual continuation of a branch line of the Union Pacific Railroad, contemplated by the act of the construction of that road passed in 1862, and to be built from Sioux City to some point on that railroad east of the one hundredth meridian,

By Chapter 144 of Acts of the General Assembly (Eleventh) which took effect May 20, 1866, this State accepted the grant, which was by the same general assembly conferred on the Sioux City & St. Paul R. R. Company. This company built its road from the southern line of Minnesota, in the direction of the Sioux City, as far as LeMars, at which point it intersects the Iowa Falls, and Sioux City Railroad now operated
6 by the Illinois Central Railroad Company, on which road the former company has trackage into Sioux City. Thus far the road was built in 1872, since which time the lands along the completed line for fifty miles have been certified to the company, aggregating three hundred and twenty-two thousand acres, or a little more than the amount to which the company was entitled under the Act of Congress. In 1878 the Company requested me to certify to it the remainder of the lands, amounting to between eighty-five thousand and ninety thousand acres. This I declined to do, on the ground that the Company had not complied with the terms of the grant which provided for a line from Sioux City to the south line of the State of Minnesota. Had the road been completed to Sioux City, the lands would have been certified, but I cannot be persuaded that a road terminating at LeMars can be fairly construed to have been built to Sioux City, even if the Railway Company has trackage to that place over another line, much less from Sioux City.

The Act of May, 1864, required the construction of the road within ten years after the acceptance of the grant by the State, after which the State had five years further to complete the work. By not completing the line to Sioux City within the time prescribed, it will be seen that the Sioux Clity & St. Paul Railroad Company has forfeited all its rights to the uncertified portions of the grant. It therefore, becomes the duty of the General Assembly to take such steps as may be deemed advisable for the purpose of securing the completion of the road contemplated in the Act of Congress. The original intent of the act was to make Sioux City a point on a great national highway between the Union Pacific Railroad and the Great Lakes and to give the people along the line contemplated the benefit of the facilities thus to be afforded. The General Assembly should see to it that to the best of its ability, the lands yet within the control of the public shall be utilized in order to secure the completion of the line for which they were intended."

Seventh. That the 19th General Assembly of the State of Iowa, in pursuance thereof exacted the following law, declaring the forfeiture of the lands granted and fully resuming the same, to wit:

Chapter 107.

An Act, to resume all the lands and rights conferred upon the Sioux City & St. Paul Railroad Company, by or under an Act of Congress approved May 12, A. D. 1874, to lands not heretofore earned by said company.

Whereas, by an Act of Congress approved May 12, 1864, entitled, "An Act for a grant of lands to the State of Iowa, in alternate sections to aid in the construction of a railroad in said State," certain lands were granted to the State of Iowa for the purpose of aiding in the construction of a railroad from Sioux City in said State, to the south line of Minnesota, at such point as the said State might select, between the Big Sioux and the west fork of the Des Moines River, which grant was made to and accepted by, the State of Iowa upon the conditions, restrictions and qualifications therein named, and

Whereas, by an act of the General Assembly of the State of Iowa, approved April 3, 1866, so much of the lands, interests, rights, powers and privileges as were or might be conferred in pursuance of said acts of Congress, to aid in the construction of the aforesaid road, were disposed of, granted and conferred upon the Sioux City & St. Paul Railroad Company, and

Whereas, said Sioux City & St. Paul Company, duly
7 accepted said grant on the 20th day of September, A. D. 1866, but has failed to complete or cause to be completed any road on the line adopted therefor, from Sioux City to LeMars, in said State of Iowa, or any road in lieu thereof.

Be it Enacted by the General Assembly of the State of Iowa:

Sec. 1. That all lands, and all rights to lands, granted or intended to be granted to the Sioux City & St. Paul Railroad Company by the said acts of Congress and of the General Assembly of the State of Iowa, which have not been earned by said railroad company by a compliance with the conditions of said grant, be, and the same are hereby absolutely and entirely resumed by the State of Iowa, and that the same be and are absolutely vested in said State as if the same had never been granted to said railroad company.

Sec. 2. This act being deemed of immediate importance shall take effect and be in force from and after its publication in the Iowa State Register and the Sioux City Journal newspaper published in the State of Iowa.

Approved March 16, 1882.

Eighth. That on the 27th day of March, 1884, the legislature of the State of Iowa relinquished to the United States

all their right and title to said lands by an act duly passed and approved; said act was as follows:

Chapter 71.

An Act to relinquish and re-convey to the United States all lands and rights to lands granted to the State of Iowa, by the Act of Congress entitled, "An Act for a grant of land to the State of Iowa in alternate sections to aid in the construction of a railroad in the State of Iowa," approved May 12, A. D. 1864, which have not been earned pursuant to the provisions of said act.

Whereas, by An Act of Congress, approved May 12, 1864, entitled "An Act for a grant of land to the State of Iowa, in alternate sections to aid in the construction of a railroad in said State" certain lands were granted to the State of Iowa for the purpose of aiding in the construction of a railroad from Sioux City in said State to the south line of Minnesota, at such point as the State might select, between the Big Sioux and the West Fork of the Des Moines River, which grant was made to and accepted by the State of Iowa, upon the conditions, restrictions, and qualifications therein named, and

Whereas, By acts of the General Assembly of the State of Iowa, approved April 3rd, A. D. 1866, and April 20, A. D. 1866, the lands, rights, powers, duties and trusts conferred upon the State of Iowa by said Acts of Congress were duly accepted on the part of the State of Iowa; and,

Whereas, By an act of the General Assembly of the State of Iowa, approved April 3rd, A. D. 1866, so much of the lands, interests, rights, powers, and privileges as were or might be conferred upon the Sioux City & St. Paul Railroad Company; and,

Whereas, by an act of the General Assembly of the State of Iowa, approved March 16, 1882, all lands and all rights to lands granted or intended to be granted to the Sioux City & St. Paul Railroad Company by said acts of Congress and of the General Assembly of the State of Iowa, which had not been earned by said railroad company by a compliance with the conditions of said grant, were absolutely and entirely resumed by the State of Iowa, and vested in said State as absolutely as though the same had never been granted to said railroad company, and,

Whereas, It is desirable that all lands and rights to lands resumed by the State of Iowa as aforesaid, should be conveyed to and vested in the United States to the end that such lands

shall be made subject to the use of actual settlers, as provided by the acts of Congress relating thereto, now, therefore,

8 Be it Enacted: By the General Assembly of the State of Iowa:

Sec. 1. That all lands and all rights to lands resumed and intended to be resumed by the chapter one hundred and seven (107) of the acts of the Nineteenth General Assembly of the State of Iowa, are hereby relinquished and conveyed to the United States.

Sec. 2. The Governor of the State of Iowa is hereby authorized and directed to certify to the Secretary of the Interior all lands which have been heretofore patented to the State to aid in the construction of said railroad and which have not been patented by the State to the Sioux City & St. Paul Railroad Company, and the list of land so certified by the Governor shall be presumed to be the lands relinquished and conveyed by section one of this act; provided that nothing in this section contained shall be construed to apply to lands situated in counties of Dickinson and O'Brien.

Sec. 3. This act being deemed of immediate importance shall take effect and be in force from and after its publication in the Iowa State Register a newspaper published at Des Moines, Iowa, and the Sioux City Journal, a newspaper published at Sioux City. Approved March 27, 1884.

Took effect by publication April 2, 1884.

Ninth. That at the time of the passage of the aforesaid act of 1882, there remained of the grant to the State of Iowa, and not yet earned and not yet conveyed to the railroad company by the State of Iowa, the following, among other land, to wit:

The Northwest quarter of Section Nine, Township Ninety-five, North of Range forty-two, West of the fifth P. M. situated in O'Brien County, State of Iowa.

Tenth. That the amount of lands granted and patented to the State of Iowa, to secure the building of a railroad from Sioux City, Iowa, to the Minnesota State line and granted conditionally to the Sioux City & St. Paul Railroad by the State, and which was withheld from conveyance to the said railroad company, by the State by reason of the company's failure to build said road any further than from the Minnesota State line to LeMars, Iowa, and by reason of the failure of the company to comply with the provisions of the granting act of 1864, and held by the State under the original grant and never certified

or patented to the company and so withheld by the state at the time of the passage of the act of forfeiture and resumption hereinbefore set out,—was 85,457.40 acres, a full and complete list, by number of said land so withheld and resumed, and so forfeited being published by the Secretary of the State of Iowa in 1883, to be found on pages 94, 95, 96 and 97 of the printed Report of the Secretary of the State of Iowa for the year 1883.

These lands were the lands that the Sioux City & St. Paul Ry. Co., had demanded a conveyance of from the State and that the Governor refused to convey and referred to in his message of 1882, and which were so withheld in 1882 at the time of the passage of the resumption act and act of forfeiture by the Iowa Legislature, and were the lands referred to in said act. This list of lands, then, and now in the office of the Secretary of the State of Iowa, was all the balance of the entire grant made for the purpose of securing the building of the railroad, granted by the General Govenment to the State, and the patenting to the said railroad company by the State of all lands earned by it for the building of all the road it did build, and the refusal to patent any more, and the action of the Governor and Executive officers, and of the Legislature of said State in making and publishing the list of lands remaining unearned and unpatented to the company and still held by the state, was a full and complete adjustment of said land grant, and made by the State of Iowa through its proper and legally constituted authorities, as authorized in the granting act to the state, and said grant then was, and has since 1882 remained fully and completely adjusted, so far as the Sioux City & St. Paul Ry. Company is concerned, or any one claiming under them, or by virtue of the act of March 3rd, 1887. And plaintiff alleges and calls especial attention of the Court to the fact that the authority conferred in the granting Act of May 12, 1864, granting land to the State of Iowa, to secure the building of a railroad from Sioux City to the Minnesota State line, also conferred upon the State of Iowa, through the legislature thereof, not only the power and authority to bestow the land upon any railroad company it might select, but also authorized and empowered the State of Iowa through its legislature in terms clearly stated the right, authority and power of adjustment, forfeiture and resumption, in case of a non-compliance, together with the right after having resumed, to secure the completion of the road by the use of such lands, either by itself, or to another company, and in this, the granting act aforesaid is unlike any other granting act to any other state ever passed by Congress. Plaintiff alleges that the State of Iowa, having this authority of adjustment, forfeiture

and resumption, as to these lands herein described, exercised it fully and completely, and then in 1884 relinquished all of said lands to which the Sioux City & St. Paul Ry. Co. would have had any right to the United States.

Eleventh. The lands set out in the aforementioned list are located in the counties of Dickinson, Plymouth, Woodbury, Sioux and O'Brien, the total of the various descriptions aggregating in all 85,457.40 acres, and being distributed in said counties as follows:

In Dickinson County.—The S. E. qr. N. W. and W. 1/2 N. W. qr., Sec. 7, Twp. 98, R. 33, 113.10 acres, and nine other descriptions all in Dickinson County, Iowa, aggregating in all 4,142.86 acres.

In Plymouth County, Sec. 5, Twp. 93, R. 47, and thirty other descriptions aggregating in all 1,780.08 acres.

In Woodbury County, Sec. 11, Twp. 89, R. 44, 640 acres, and thirty other descriptions aggregating in all 14,197.25 acres.

In O'Brien County W. 1/2 S. W. qr., Sec. 7, Twp. 96, R. 39, 62.25 acres, and one hundred and nine other descriptions aggregating in all 55,297.21 acres, in which is found the following land; the northwest quarter of section 9, Township 95, range 42, W. 5th P. M., O'Brien County, Iowa, being the land involved in this suit.

In Sioux County the N. E. qr., S. E. qr., Sec. 15, Twp. 97, R. 46, 40 acres, making a total of 85,457.40 acres.

Twelfth. That no further and other list of said lands was ever made either by the State of Iowa, or by the United States, nor was any other or further adjustment of the lands ever made so far as the Sioux City & St. Paul Ry. Co., was concerned, either by the State, or by the United States nor were any of the said lands included in said list ever conveyed by the State of Iowa or by the United States, to said Sioux City & St. Paul Ry. Company or its successors or assigns or to any one
11 for their use and benefit, but has remained the permanent adjustment of the grant to said Railroad Company and that at said time in 1882, when the Governor of the State of Iowa refused to convey any of said land to the said Railroad Company and when the Iowa legislature recited the failure to complete said road in accordance with the terms and conditions of the grant and resumed the same, said railroad company had received all the lands to which it was entitled on account of the building of the road from the Minnesota State line to La Mars, in all amounting to 322,412.81 acres, which had been conveyed to it by the State as directly authorized to do so under

the grant, and the State refused to convey any more land. The land so refused to be conveyed by reason of the failure of the railroad company to construct the road was the land herein enumerated and set out and included the land in question in this suit.

Thirteenth. Plaintiff represents that for many years after the adjustment and resumption and forfeiture of said grant to the Sioux City and St. Paul Railway Company by the Act of the Iowa legislature and the officer of the State, and the relinquishment of the land herein in question by the legislature of the State of Iowa, to the general government, said land remained open, unoccupied, and unappropriated public land, and that more than three years after this resumption act and more than one year after the relinquishment act, to wit, in August, 1884, plaintiff herein settled upon said land with the open and declared purpose of taking said land as a homestead, to wit: The Northwest quarter Section 9, Township 95, Range 42, O'Brien County lands, and did erect thereon a house and break and cultivate, and fence said land, putting improvements thereon of the value of one thousand seven hundred and fifty dollars, and that he has ever since resided thereon, claiming the same as his home under the homestead laws of the United States; and that some time in 1884, he cannot remember the exact date, he tendered to the officers of the U. S. Land Office, at Des Moines, Iowa, a homestead filing for said land, with the necessary legal fees therefor, which said filing for said land was from some cause unknown to the plaintiff, refused by said office; but that he continued without hindrance to re-
12 side on said land.

Fourteenth. Plaintiff further reprersents that on the 18th day of November, 1895, the Secretary of the Interior issued a proclamation or notice, and instructions relating to the entry of said land herein described, among other lands that claimed by the plaintiff; a copy of said notice and instructions being made a part hereof, and hereto attached, marked "Exhibit A." That pursuant thereto, and on March 10, 1896, the plaintiff appeared at the Local Land Office, at Des Moines, Iowa, and tendered his homestead filing for said land, alleging his settlement, residence, and cultivation of said land, and his legal qualifications to make said entry, all in full compliance with the law, and tendered the legal and proper fee and homestead filing therefor, which filing and tender of fees the Land Office held in abeyance, pending a trial and examination of the right of all parties concerned including his own right and the claim of defendant Elmira Knepper, to purchase said land under and by virtue of an alleged contract of sale made with the Sioux City & St. Paul Ry. Co., to Elmira Knepper, to pur-

chase said land, on the 21st day of June, 1887, the defendant claiming the right by reason of said contract to purchase the same of the Government, under and by virtue of the fourth section of an Act approved March 3rd, 1887 (24 Stat. 556) even as against the homestead and settlement rights of the plaintiff herein, although defendant had never in any manner resided upon said land or cultivated the same, or in any manner attempted to comply with the homestead and settlement laws of the United States for obtaining public government land. A copy of said contract of purchase, under which the said defendant Elmira Knepper claimed the right of purchase under said section being hereto attached, marked Exhibit "B" and made a part hereof.

Fifteenth. The plaintiff alleges that said contract was made after the passage of the act of March 3rd, 1887, and that said contract and the lands affected thereby do not come within the terms of said act, nor the fourth section thereof. That title never having been in said company, nor any one for its use and benefit, the company never having earned the land, not having been entitled to the land, the time having long
13 since lapsed within which it might be earned from the State, and the State which held the title under a special grant with full power of adjustment and forfeiture, had fully adjusted the grant and forfeited and resumed the land which it held, refusing to patent the same to the company. That said land grant was legally and fully adjusted long prior to the passage of the act of March 3rd, 1887, and the railway company had received the full amount of land that it was entitled to receive, and the full amount of land that it could receive, and the time had elapsed in which it could build the road, or earn or receive any more land under the law, and that said act applied only to unadjusted land grants and only to sales made in good faith prior to the passage of the said act, and the purchase being long after all of this had been done, and defendants were bound to take notice thereof and could not in law or equity be good faith or bona fide purchasers.

The plaintiff also alleges that said contract of purchase from the Sioux City and St. Paul Railway Company made by Elmira Knepper, was void, the same being contrary to the provisions of the granting act of 1864, and without any authority of law, which act prohibited the sale, transfer, or incumbrance of said land until the same had been earned and patented to the said company which was never done, and of all of which defendant was bound to take notice. And plaintiff further alleges that under the law and facts, no sale or purchase could be made at the time it was made of the land described, whereby the purchaser could be en-

titled to the provisions of the act of March 3rd, 1887, and alleges that said Elmira Knepper purchasing claimant, was bound to take notice of the refusal of the State of Iowa to convey said land to the railroad company, and of the fact that it had already received all the land that it was entitled to receive by reason of the building of the railroad from the Minnesota State line to LeMars, Iowa, only, and was bound to take notice of the acts of Iowa Legislature declaring said land forfeited and of the relinquishment of the same to the United States in 1884, and to take notice of the failure of the company, to construct said road, as declared by the said legislative act, within the time limit of the granting act of 1864, and
14 it could not at the time of the purchase or ever, be entitled to receive said land, and that it was legally impossible for the purchasing claimant to have been a good faith innocent or bona fide purchaser.

Sixteenth. Plaintiff represents that on the 10th day of March, 1896, he appeared at the U. S. Land Office, in Des Moines, Iowa, and tendered his application, affidavits of qualification and eighteen ($18.00) dollars fees and commissions to enter said land under the homestead laws, alleging prior settlement, residence and cultivation since 1884; but that the Register and Receiver, instead of accepting said application to enter same as a homestead under his residence and qualification, issued notice fixing the date for a hearing or trial, in which all persons claiming said land were ordered to appear, and on the 20th day of March, 1896, the plaintiff herein appeared in person and with counsel and a trial was had and evidence taken and the register and receiver found and decided that plaintiff herein was entitled to said land under his homestead application, by reason of his residence, cultivation of the land, and qualifications as a homesteader therefor, the fact of his settlement in 1884, and continuous residence thereon since that time, and the cultivation of said land, and his full and complete compliance with the homestead laws of the United States relative to taking government land under said laws was fully and completely established, all of which facts as found, plaintiff alleges to be true. The said purchasing claimant, defendant herein, appealed to the Commissioner of the General Land Office, and on the 20th day of July, 1899, the Commissioner of the General Land Office of the United States, at Washington, decided that the plaintiff was entitled to said land under the homestead laws of the United States. A copy of which opinion, finding of facts, and decision thereunder, is hereto attached, marked Exhibit "C" and made a part hereof. Plaintiff herein further represents that the defendant herein further appealed from this decision to the Secretary of the Interior, and

that after hearing the question under the law and the evidence, the Secretary decided that the purchasing claimant had the right to purchase said land, by reason and by virtue of his con-
tract with the railway company, heretofore referred to
15 and marked Exhibit "B" unlawfully and without any
authority of law therefor, on the 24th day of April, 1900, reversed the action of the register and receiver, and of the Commissioner of the General Land Office, and unlawfully and without any authority of law, rejected plaintiff's application to enter said land under the homestead laws of the United States, and allowed the entry and proof of the said defendant, under his so-called purchase from the Sioux City & St. Paul Ry. Co., a copy of said decision being hereto attached marked Exhibit "D" and made a part hereof; and that in pursuance of said decision, and under the order of the Secretary of the Interior, the General Land Office is about to issue, or has already issued, a patent to said land to the said defendant as purchasing claimant; solely under said so-called contract under the fourth section of the act of March 3rd, 1887, and plaintiff alleges that said decision of the Secretary of the Interior, allowing said purchasing claimant to enter and take said land by reason of, and by virtue of said contract made with the Sioux City & St. Paul Ry. Co., aforesaid, and under the fourth section of the act of March, 1887, or any other section thereof, is contrary to law and absolutely void.

Seventeenth. And plaintiff, by reason of his long residence, as alleged, and cultivation of said land, and by reason of his homestead rights, and by reason of the premises herein stated, is entitled to have said land under the homestead laws of the United States and a patent thereto. And plaintiff alleges that the allowance of said patent to the purchasing claimant and the order for the issuance of the same, in case the same has already been issued to the defendant on said land, is all, each and singular, unlawful and contrary to law, and without authority of law.

Eighteenth. And plaintiff further alleges that he has never sold, relinquished, assigned or abandoned his said homestead claim, and that he now resides upon the said land, and has already complied with the homestead laws of the United States as to residence, cultivation, etc., and is legally entitled to said
lands under said laws, having resided thereon, in the
16 manner and form described by law, for more than five
years prior thereto, and that his proofs already made, accepted, admitted and found by the decision of the Register and Receiver, and the Commissioner of the Genral Land Office, should be accepted, and plaintiff asks that patent to said land, allowed in favor of defendant, be either declared null and void

and set aside, and the Secretary of the Interior ordered to cancel the same of the records of his office, or that the court shall issue a decree declaring that the said defendant holds the land in trust for the said plaintiff, and that said decree will order, make, and declare the full and compleete transfer of title to said land from the defendant to the plaintiff herein, and make such other and further order as to the court may seem right, legal, just, equitable and proper.

Nineteenth. Wherefore may it please your honors to grant to the plaintiff a writ of subpoena, issued out of and under the seal of this court, directed to the defendant, Elmira Knepper commanding him, at a certain day, personally to appear before your honors, and this court, and there answer all and singular the premises, and to perform such order and decree as to your Honors shall seem meet, and to allow plaintiff judgment and decree against the defendant Elmira Knepper, accordingly, and for cost of this suit; and that this order of the Secretary of the Interior, made contrary to and without authority of law, be set aside, cancelled, and declared void, and of no force and effect.

And the plaintiff further prays that in the event that this patent be not set aside from any reason, that plaintiff may have judgment against the defendant in addition to the costs of this suit for eight thousand dollars ($8,000.00) the value of said land so erroneously, unlawfully and improperly patented to the said defendant, and for such other relief as the court may seem meet and just.

KING & STERNS,
Attys. for Plaintiff.

M. B. DUNN,
Of Counsel.

17 State of Iowa,
County of O'Brien—ss.

John A. Sands, being duly sworn, upon oath deposes and says, that he has heard read the foregoing petition; that he is the plaintiff therein named, that the statements therein made from his own personal knowledge, he knows to be true, and those made from information and belief, he believes to be true, in substance and fact, so help me God.

JOHN A. SANDS.

Subscribed and sworn to before me and in my presence this 16th day of March, A. D. 1901.

[Seal] WM. H. DOWNING,
Notary Public in and for O'Brien County.

"EXHIBIT A."

6-5907 Department of the Interior,

F. General Land Office,
Washington, D. C., Nov. 18, 1895.

Register and Receiver,
Des Moines, Iowa,

Sirs: During the years 1872, 1873, and 1875, certain lands were patented to the State of Iowa, under the Act of Congress approved May 12, 1864, for the Sioux City and Saint Paul Railroad Company; said company failed to complete the construction of its road as definitely located, and the State withheld from it 85,457.40 acres of the land so patented, as not having been earned. Of the lands patented for the Sioux City Company, the Chicago, Milwaukee, and Saint Paul Company recovered 41,867.52 acres; which included a part of these lands, another part thereof was reconveyed to the United States by the State of Iowa and were restored to entry, and for the balance the United States instituted suit against the Sioux City Company for the recovery of title. That suit was decided October 21, 1895, by the Supreme Court, in favor of the United States, and said court on the same day decided that the Milwaukee Company which had been allowed to intervene as a defendant, had no interest in the lands, and that there was no foundation for a suit by said company to compel the United States to surrender any title it may have, however such title may have been acquired.

This leaves the title to the lands involved in the suit in the United States and subject to disposal by the Department.

Therefore, in order to carry their restoration to entry into effect, you will cause to be published for a period of thirty days, in some newspaper of general circulation in the vicinity of the lands, a notice that said lands, a particular description of which will be published with the notice, are restored to the public domain and will be subject to entry on a day to
18 be affixed by the notice, which shall be ninety (90) days from the date of the first publication, and that all persons claiming any part thereof under the act of March 3, 1887 (24 Stat. 556) must come forward within the ninety days immediately following the first publication, and give notice of their claims by publishing their notice of intention to make proof in accordance with the requirements of the circular of February 13, 1889 (8 L. D. 348) upon a day which shall be subsequent to that affixed for the restoration.

To the end that complications which might arise from the former practice of suspending applications for these lands may be avoided, and the [rightfuly] claimants be enabled to acquire title with as little delay as possible, I have to direct that in the notice of restoration there be inserted a notice to all prior applicants, that their applications confer no rights upon them, and that upon the day set by you for the restoration, the lands will be open to entry and disposal without regard to such applications, which shall be held by the notice to the rejected.

That all such applicants may, however, have opportunity to present new applications upon the expiration of the ninety days' notice, you will notify specially all parties shown by your records to have pending applications for these lands, of the rejection thereof, of the date of restoration, and of the necessity of presenting new applications for the protection of their rights.

In all cases of conflicting claims, you will proceed in accordance with the rules of practice in contest cases.

A list of lands to be restored by descriptive subdivisions is enclosed herein.

You will promptly forward a copy of the newspaper containing the notice of the restoration, for the information of this office.

The receiver, or disbursing officer, will pay the cost of publication and forward a copy of the notice, with proof of publication, as his voucher for the disbursement.

Very respectfully,

S. W. LAMOREAUX,
Commissioner.

Appd: HOKE SMITH, Secretary,

19 List of Lands involved in Suit of

United States,
vs.
Sioux City and St. Paul Railway Company.

Dickinson County.

	Sec.	T.	R.	Acres.
All	15	98	38	640.00
N.W. 1/4	17	"	"	160.00
				800.00

O'Brien County.

	Sec.	T.	R.	Acres.
S 1/2 N.W. 1/4 & S W 1/4	9	95	40	240.00
S W 1/4 N W 1/4	7	97	40	34.50
W 1/2	5	95	41	318.64
All	7	"	"	602.00
S E 1/4 S W 1/4 & S 1/2 N W 1/4	11	"	"	480.00
All	13	"	"	640.00
All	15	"	"	640.00
W 1/2	19	"	"	288.76
All	23	"	"	640.00
All	25	"	"	640.00
All	27	"	"	640.00
N E 1/4 N W 1/4	3	96	41	39.95
S E 1/4 N E 1/4	15	"	"	40.00
S W 1/4 S W 1/4	13	97	41	40.00
E 1/2 S W 1/4 & N E 1/4 S E 1/4	35	"	"	120.00
All	1	95	42	641.36
N 1/2 Sec. S W 1/4, N 1/2 S E 1/4 and S E 1/4 S E 1/4	5	"	"	590.82
S E 1/4 N W 1/4, W 1/2, S E 1/4, N 1/2 N E 1/4 & S e 1/4 N E 1/4	7	95	42	390.41
All	9	"	"	640.00
S 1/2 N E 1/4, S 1/2 N W 1/4 and S 1/2 Sec.	11	"	"	560.00
All	15	"	"	640.00
All	17	95	42	640.00
S E 1/4 N W 1/4, W 1/2 N W 1/4, S E 1/4 N 1/2 N E 1/4 and S E 1/4, N E 1/4	7	95	42	390.41
All	9	"	"	640.00
S 1/2 N E 1/4, S 1/2 N W 1/4 and S 1/2 Sec.	11	"	"	560.00
All	15	"	"	640.00
All	17	95	42	640.00
E 1/2 N E 1/4, W 1/2 S W 1/4, S E 1/4 S W 1/4 & S E 1/4	19	"	"	353.49
All	21	"	"	640.00
All	23	"	"	640.00
All	27	"	"	640.00
S 1/2 of	29	"	"	320.00
E 1/2 N E 1/4 & S E 1/4 N W 1/4	31	"	"	120.00
All	3	96	"	646.16
[20]				
S 1/2	5	"	"	320.00
N W 1/4 N E 1/4 & E 1/2 S E 1/4	7	"	"	120.00
All	11	95	42	640.00
All	15	95	42	640.00
W 1/2	17	"	"	320.00

	Sec.	T.	R.	Acres.
S W 1/4 N E 1/4, S E 1/4 N W 1/4 & N W 1/4 N W 1/4	19	"	"	116.17
All	23	"	"	640.00
All	29	"	"	640.00
E 1/2 S E 1/4	31	"	"	80.00
All	33	"	"	640.00
All	3	97	42	595.60
S W 1/4 N E 1/4, N E 1/4 N W 1/4 and N W 1/4 S E 1/4	7	"	"	120.00
All	9	97	42	640.00
All	17	"	"	640.00
E 1/2 N E 1/4 & N 1/2 S E 1/4	19	"	"	160.00
All	25	"	"	640.00
S 1/2	29	"	"	320.00
S E 1/4 N E 1/4 & N E 1/4 S E 1/4	31	"	"	640.00
S 1/2	33	"	"	320.00
All	35	"	"	640.00
Total				21,979.85

21 Department of the Interior,
General Land Office,

Washington, D. C., Apr. 1900.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy of Commissioner's letter of Nov. 18, 1895, to the Register and Receiver at Des Moines, Iowa, and of the lists of lands which accompanied it, are true and literal exemplifications from the record thereof in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed at the City of Washington on the day and year above written.

BINGER HERMANN,
Commissioner of the Gen. Land Office.

(Copy)
22 No. 493

Land Department of the

Sioux City and St. Paul Railroad Company.

This Agreement, made this twenty-first day of June in the year 1887, between The Sioux City & St. Paul Railroad Company, and Elias F. Drake and Amherst H. Wilder, Trustees named in a certain Trust Deed, executed by said Company, and dated August 1st, 1871, of the first part, and Elmira Knepper of Sheldon, County of O'Brien, State of Iowa, of the second party,

Witnesseth, That in consideration of the stipulations herein contained, and the payments to be made as is hereinafter specified, the first party hereby agrees to sell to the second part-, the North West quarter of Section 9, in Township 95 North, of Range 42 West of the fifth principal meridian, containing according to the United States survey,———acres, be the same more or less, for the sum of twenty-one hundred and sixty dollars, on which the said second party hath paid the sum of ———dollars on account of the principal.

And the said second party in consideration of the premises, hereby agrees to pay to the said first party, at the office of the Land Department Sioux City and St. Paul Railroad Company, at St. Paul, Minnesota, the following sums of principal and interest at the several times named below:

When due	Principal	Interest	Back Int	Total	Deposit	Total	Evidence of Payment
On or be Fore Jan 1-1888		82.88		82.88	Recd	82.88	Dec 30/87 W P J L. C.
						196.00	Rec Apr 25/89 WPJ & LC
Jan 1-1889	196	156.80		352.80		156.80	Rec Feb 12/89 " " "
1890	196	141.12		337.12		420.00	Rec Jan 15/90 W P J L C
1891	196	125.44		321.44			
1892	196	109.76		305.76			
1893	196	94.08		290.08			
1894	196	78.40		274 40			
1895	196	62.72		258.72			
1896	196	47.04		243.04			
1897	196	31.36		227.36			
1898	196	15.68		211.68			

And it being mutually understood that the above premises are sold to said party for improvement, and cultivation, the said second party hereby further agrees and obligates herself and her heirs and assigns, that all improvements placed upon said premises shall remain thereon, and shall not be removed or destroyed, until final payment for said lands. And further that she will punctually pay said sums of money above specified as each of the same becomes due; and that she will regularly and seasonably pay all such taxes and assessments as may be lawfully imposed upon said premises.

23

And in case the said second party, her legal representatives or her assigns, shall pay the several sums of money aforesaid, punctually, and at the several times above limited and shall strictly and literally perform all and singular the agreements and stipulations aforesaid, according to their true tenor and intent, then the first party will make unto the said second party

her heirs or assigns (upon request at the Land Office of the first party at St. Paul, and the surrender of this Contract), a deed conveying said premises, in fee simple, with the ordinary covenants of warranty; reserving, however, a strip of land one hundred feet wide, to be used by the first party for a right-of-way or other railroad purposes, where the main line or any branch of its railroad is laid over the premises.

But in case the second party shall fail to make the payments aforesaid, or any of them, punctualy and upon the strict terms and times above limited, and likewise to perform and complete all and each of the agreements and stipulations aforesaid, strictly, and literally, without any failure or default, the time of payment being of the essence of this contract, then the party of the first part shall have the right to declare this contract null and void, and all right and interest hereby created or then existing in favor of the second party, or derived under this contract, shall utterly cease and determine and the premises hereby contracted shall revert to and revest in said first party, (without any declaration of forfeiture, or act of re-entry, or without any other act by said first party to be performed, and without any right of said second party of reclamation or compensation for moneys paid and improvements made) as absolutely fully and perfectly as if this Contract had never been made.

And it is further stipulated, that no assignment of
24 the premises shall be valid unless the same shall be endorsed hereon, or permanently attached hereto, and countersigned by the first part-, (for which purpose this Contract must be sent to this office) and that no agreements or conditions, or relations, between the second party and her assigns or any other person acquiring title or interest from or through her shall preclude the first party from the right to convey the premises to said second party or her assigns, on the surrender of this agreement and the payment of the unpaid portion of the purchase money which may be due to the first party.

In witness whereof, The Sioux City and Saint Paul Railroad Company hath hereunto caused its corporate seal to be affixed and hath caused these presents, in duplicate, to be signed by its proper officer, and the second party hath hereunto set her name and the said Trustees have hereunto set their names, in the day and year above written.

ELIAS F. DRAKE,
President Sioux City & St. Paul Railroad Company.

[Seal]

GEO. A. HAMILTON,
Secretary Sioux City & St. Paul Railroad Company.

Countersigned and approved:

W. P. Jewett,
W. A. Petterson,
E. McMurtin,
Dan'l Morfitt,
Witnesses.

Amherst H. Wilder,
Elias F. Drake,
Trustees.

ELMIRA KNEPPER, Purchaser.
By W. H. Knepper, her Atty.

Indorsed: Copy No. 493. Agreement Sioux City & St. Paul R. R. Co., with Elmira Knepper for N. W. 1/4 of Sec. 9, Town. 95, Range 42. P. O. Sheldon, County of O'Brien, State of Iowa.

25

EXHIBIT "C."

12-11,893
"T"
W. K. M.

Department of the Interior
General Land Office.

S. S. M.
W. O. C.
J. V. W.

Washington, D. C., July 20, 1899.

John A. Sands,
vs.
Elmira Knepper.

N. W. 1/4, Sec. 9, T. 95, N. R. 42 W.
O'Brien County Lands.

Register and Receiver,
Des Moines, Iowa,

Sirs: I am in receipt of your letter of April 19, 1897, transmitting the record in the case of Elmira Knepper vs. John A. Sands, involving N. W. 1/4 Sec. 9, T. 95, N. R. 42, W., and have duly considered said record.

This tract was within the primary limits of the grant to the State of Iowa, of May 12, 1864, to aid in the construction of a railroad from Sioux City to the south line of the State of Minnesota, which grant was conferred by the State upon the Sioux City & St. Paul Railroad Company; it is opposite to the constructed portion of the road and was patented to the State for the use of said railroad June 17, 1873.

In suit instituted by the United States aganst said company to recover title to said lands to the Government, because of being in excess of the [quality] the company was entitled to for length of road completed the Supreme Court of the United States on October 21, 1895 (159 U. S. 349) decided favorably to the Government, thus restoring the title to it.

In view of said decision instructions were issued by order of the Department, Nov. 18, 1895, directing that the lands thus recovered be opened to entry after ninety days published notice, and that parties claiming to be purchasers of any of said lands from the company should be notified to present their claims within such period under the act of March 31, 1887.

26 By your notice published pursuant to said instructions the time for the opening of the lands to entry was set for February 27, 1896. On January 15, 1896, Elmira Knepper filed her application to make proof for said N. W. 1/4, also notice to make said proof on March 20, 1896, before your office; which was duly published.

On January 21, 1896, Mr. Sands also filed application to make proof under said act for the same tract with notice that the same would be made before your office April 29, 1896.

On March 10, 1896, Mr. Sands also filed homestead application for said land alleging settlement on the tract in 1884.

Your office also reports that on February 27, 1896, the following persons filed application to enter the land under the homestead laws.

William A. Richards, Frank Freeman, Ely McQuiston, William E. Wait and James V. Ryan.

The case came on hearing under notice of Mrs. Knepper March 21.

Elmira Knepper appeared by W. H. Knepper, and her attorney W. P. Jewitt, John A. Sands appeared by his attorneys J. F. Conrad and King and Stearnes.

Mr. Jewitt filed special power of attorney from Elmira Knepper to William H. Knepper, to make application for patent under act of March 3, 1887, for the land in dispute, executed January 9, 1896; also copy of a general power given by her to him, dated September 7, 1880, to transact all business for her.

After taking testimony on behalf of Mrs. Knepper the hearing was adjourned to the 29th of April under notice of Sands for hearing; this hearing was held on May 1, 1896.

The testimony is to the effect that Mr. Knepper and Mrs. Elmira Knepper who is his wife, resided upon the S. W. 1/4 Sec. 4, adjoining the land in dispute since 1880; that prior to and in 1884, Mr. Knepper pastured his stock on part of the land in dispute but did not in any manner reduce the land to possession as the stock of other people also pastured there; that

about May of 1884, one Weaver commenced to break on
27 the land, broke a small piece, that in August, 1884, the claimant John A. Sands bought Weaver's breaking and claim and took possession of the tract, built a house on it and commenced residing there; that Knepper was aware of his occupancy and had in fact advised Sands to go into possession as (he said) the Weavers had no claim; also that he saw Sands building his house and made no objection; that in 1885 Sands built an addition to the house, and has ever since resided there with his parents and has broken and cultivated about 100 acres of the land; that June 21, 1887, William Knepper as attorney for Mrs. Elmira Knepper, made a contract of purchase with the railroad company whereby he purchased in her name the land in controversy for $2120 and on which payments have been made amounting in all to $1015.68; that in 1888, Mr. Knepper fenced in about 20 acres in the Northwest part of the tract immediately adjoining his home farm and which embraced the part he had had in immediate use for pasturage and has used said 20 acres since that time for pasturage except an acre or two which he used for a hog yard, and on which he had built a hog house; that Knepper made no effort to disturb Sands in his possession or to dispute his right to the land until after the purchase from the company; and that he then endeavored by court proceedings to have him ousted but without success; that Sands has always declared that he would not purchase the tract from the railroad company although advised to do so; but would hold it for a homestead; that he made an application to homestead the tract in 1885 which, however, was rejected; that Mrs. Knepper knew he was living on and claiming the land before she purchased; that she had seen him on the place and made no objection and that his improvements are worth $1750.

Upon this evidence you decided in the favor of Sands and rejected all other applications. From this decision Knepper alone appeals.

All the applicants claiming adverse to Sands (except Knepper) having failed to appear after due notice of your decision, their applications stand rejected and their cases are closed.

As to Elmira Knepper and Sands, the 4th Section of the Act of March 3, 1887, provides relief for those persons who had in good faith purchased land from the railroad companies which had been patented or certified thereto, but which in sub-
28 sequent proceedings should be found not to be within the purview of the grant.

In the construction of this statute it has been repeatedly ruled by this office that good faith is not manifested where at the time of the purchase, the purchaser is aware that the land is settled upon and occupied by one claiming the tract to be public land and is holding it under the public settlement laws with the intention to enter the same should it become subject to entry.

Now, in the case at bar the testimony clearly proves that Mrs. Elmira Knepper, the purchaser, residing on the adjoining land with her husband, was fully aware that Sands was residing on the land as early as 1884, had seen him there and had made no objection to his occupancy so that she had personal knowledge of his settlement and claim at the time of the purchase. So also Mr. Knepper her attorney in the matter of the purchase had full knowledge of Sand's claim long prior to and at the date he made the purchase for his wife.

It must therefore be held that Mrs. Elmira Knepper was not bona fide purchaser under the law.

Knepper advances an occupancy by himself of the tract at the time Sands settled but this consisted solely in pasturing his cattle on a part of the land but as this was done also by other parties with their cattle, and as he did not reduce the tract to actual possession and made no claim to the land under the settlement laws we give no weight to it. Further, whatever personal rights he could possibly have claimed by it, they were abandoned by him when he purchased the tract for his wife.

Improvements made afterwards were his wife's and not his, and these were very small, consisting of some fencing and a hog house.

I see no error in your decision and affirm the same. Notify the parties in interest hereof and allow the usual time for appeal.

Mrs. Knepper will be notified by this office through her resident attorney.

Very respectfully,

BINGER HERMANN, Commissioner.

J. D. S.

29 EXHIBIT D.

Department of the Interior.

Vol. 27 Washington, April 24, 1900.
No. 482
W. V. D.

John A. Sands,
vs.
Elmira Knepper.

The Commissioner of the General Land Office,

Sir: Elmira Knepper appeals from the decision of your office of July 20, 1899, rejecting her application for a confirmatory patent to the N. W. 1/4 of Sec. 9, Tp. 95, N., R. 42 W. O'Brien County, Iowa, and within the limits of the Des Moines, Iowa, land district, under the provisions of the act of March 3, 1887 (24 Stat. 556).

The title of this tract and others was declared to be in the government by the decision of the Supreme Court, of the United States, on October 21, 1895 (159 U. S. 349) and pursuant to instructions from your office, it was, with other tracts,—the disposition of which was controlled by said decision,—restored to entry on February 27, 1896, after allowing claimants under said act of March 3, 1887, time to give notice of their intention to offer proof in support of their claims. The local office, upon the evidence submitted at the hearing between the respective applicants, decided in favor of John A. Sands, allowing his application to make homestead entry for the tract, filed March 10, 1896, and upon appeal your office affirmed this decision; these concurring decisions are evidently based upon the occupancy, residence and cultivation of the tract by Sands before its purchase from the railroad company by Mrs. Knepper, on June, 1887, through her husband, William H. Knepper, acting as her general attorney in fact. The prior possession and residence of Sands was known to the Kneppers, who resided upon an adjacent tract and Knepper advised Sands that he could go upon the lands without purchasing the claim of one Weaver, who formerly claimed the tract because the latter had no right to the tract.

30 Sands paid Weaver fifty dollars for the possessory right of the latter, and has expended about two thousand dollars in the improvements of the land, including the breaking of a considerable portion of it; no objection seems to have been made to Sand's occupancy of the premises until after the purchase of the tract from the railroad company, was made on behalf of Mrs. Knepper, after which Knepper, during the temporary absence of Sands, fenced in about twenty acres the possession of which she has retained ever since. Sands

claimed the tract as a homestead, and made application to make an entry therefor in 1885, about the time he established his residence thereon; but this application was rejected. He did not seek to purchase from the railroad company, although he could have done so before Mrs. Knepper's contract was executed. Mrs. Knepper agreed to pay the railroad company $2120 for the tract, and has made payments thereon amounting to $1015.68. She also agreed to pay the taxes on the land, which she had done from year to year, the same aggregating between $200 and $300. There is nothing to show that the purchase was not made in good faith relying upon the title of the railroad company under the outstanding patent issued for its use and benefit June 17, 1873, long before Sands' settlement on the tract. The possession of Sands at the time of Mrs. Knepper's purchase is relied on as making the purchase one in bad faith. But by the recent Departmental decision in the case of Tow vs. Manley (29 L. D. 504) it was, in effect, held that the fact that a tract had been settled upon prior to the date of the purchase thereon from the railroad company, but after the patenting of the tract to the State for the use and benefit of the company, on the faith of which the purchase was made, there being no entry or other claim to the land at the time of the patenting, does not effect the bona fides of the purchaser or prevent a confirmation of title in the purchaser under section 4 of the act of March 3, 1887. This case controls the disposition of the parallel case at bar.

That Knepper before Mrs. Knepper's purchase from the railroad company, told Sands that Weaver a former settler, had no claim upon the land and that he, Sands, could take the same without buying Weaver out, does not constitute an es-
31 toppel on the part of Knepper, or his wife for whom he was acting as attorney in fact. Sands evidently did not rely upon this advice, and it could not have influenced his settlement upon the tract, as he purchased Weaver's claim, which seems to have been based upon nothing substantial. The land was not then subject to entry, having been withdrawn therefrom on account of the grant to the railroad company and the patenting of the land to the State as trustee for the company. No advantage was taken of Sands, as at any time for about two years after his settlement he could have purchased from the company had he chosen to do so.

The decision of your office is reversed; the application of Elmira Knepper for a confirmatory patent to the tract in dispute will be allowed, subject to her compliance with the law and the regulations governing such applications. The papers in the case are herewith returned.

Very respectfully,

(Copy) E. A. HITCHCOCK, Secretary.

32 (Copy)

F. W. C.
S. V. P.

Department of the Interior.

27-248
W. V. D.

Washington, July 9, 1900.

John A. Sands,
vs.
Elmira Knepper.

The Commissioner of the General Land Office,

Sir: With your office letter of the 30th ult. was transmitted a motion filed on behalf of John A. Sands, for review of departmental decision of April 24 last (not reported) in which the application of Elmira Knepper for a confirmatory patent under the provisions of Section 4, of the Act of March 3, 1887 (24 Stat. 556) to the N. W. 1/4 of Sec. 9, T. 95 N. R. 42 W., Des Moines land district Iowa, was sustained, and the conflicting homestead application of John A. Sands was rejected.

Said motion alleges nothing but what was fully considered at the time of the rendition of the decision under review and no reason appears for disturbing the conclusion arrived at in said decision. The said motion is accordingly denied and is herewith returned for the files of your office.

Very respectfully,

E. A. HITCHCOCK, Secretary.

Indorsed: No. 199 Equity. In the Circuit Court of the Northern District of Iowa, Western Division, in and for the Eighth Judicial District. John A. Sands, plaintiff, vs. Elmira Knepper, defendant. Petition. Filed March 18, 1901. A. J. VanDuzee, Clerk. By J. H. Bolton, Deputy.

33 And afterwards, to wit, on the 1st day of April, 1901, there was filed in the office of the Clerk of said Court in said cause, a Subpoena in Chancery and Marshal's return of service thereon, which is in words and figures following, to wit:

United States of America,
Northern District of Iowa,
Western Division—ss.

The President of the United States to Elmira Knepper,

We command you and each of you that you appear before the Judge of the Circuit Court of the United States for the Northern District of Iowa, at Sioux City, on the first Monday of May it being the 6th day of May next (A. D. 1901), to answer

to the bill of complaint of John A. Sands this day filed in the office of the clerk of said court, and then and there to receive and abide by such judgment and decree as shall then and thereafter be made, upon pain of such judgment being pronounced you by default.

To the Marshal of the Northern District of Iowa, returnable to the May Rule day, it being Monday the 6th day of May A. D. 1901.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the U. S. at Sioux City this the 18th day of March A. D. 1901, and of the Independence of the 125th yr.

[Seal] A. J. VANDUZEE,
Clerk U. S. C. C., Northern District of Iowa.
J. H. Bolton, Deputy.

Memorandum: The within named defendant is notified that unless she enters her appearance in the Clerk's office of said Court at Sioux City aforesaid on or before the day to which the above writ is returnable, as above stated, the complaint will be taken against her as confessed, and a decree entered thereon accordingly.

[Seal] A. J. VANDUZEE,
Clerk U. S. C. C. Northern District of Iowa.
By J. H. Bolton, Deputy.

34 (Marshal's Return): This writ came into my hands for service on the 19th day of March, A. D. 1901, and I served the same on the within named Elmira Knepper, on the 21st day of March, 1901, by delivering a true copy of the same to Elmira Knepper, at 4 M. S. W. Archer, in the County of O'Brien, and State of Iowa, Edward Knott, U. S. Marshal. J. A. Tracy, Deputy. Marshal's fees, expenses, 1.49; service, $2.00; $3.49.

Indorsed: No. 199. Equity Subpoena in Chancery. Circuit Court of the United States in and for Northern District of Iowa. John A. Sands vs. Elmira Knepper. Returnable to Rule Day the first Monday in May A. D. 1901. A. J. VanDuzee, Clerk. Filed April 1, 1901. A. J. VanDuzee, Clerk. J. H. Bolton, Deputy.

And on the 6th day of May, 1901, there was filed in the office of the clerk of said court in said cause a Demurrer to the Bill which Demurrer is in words and figures following, to wit:

In the Circuit Court of the United States in and for the Northern District of Iowa, Western Division.

John D. Sands, Plaintiff,
vs.
Elmira Knepper, Defendant.

Demurrer of Elmira Knepper, Defendant.

This defendant, not confessing all or any of the matters in the Bill of Complaint contained to be true, as therein set forth, doth demur to said Bill for that the same does not state such a cause, nor contain any matter of equity, entitling the complainant to any relief against this defendant.

Wherefore she prays the judgment of the Court whether she shall be compelled to further answer said bill and further prays to be dismissed with her costs.

J. S. STRUBLE, Atty. for Defendant.

I, J. S. Struble, of counsel for the defendant in the above cause, do hereby certify that the foregoing Demurrer to the Bill of Complaint is in my opinion well founded in law.

J. S. STRUBLE.

35 Affidavit.

United States of America,
Northern District of Iowa,
Western Division—ss.

I, W. H. Knepper, being duly sworn, on my oath do depose and say that I am the husband of the above named defendant, Elmira Knepper, and am also her duly authorized agent, in virtue of a written Power of Attorney, to conduct and transact her business in relation to the land described in the Bill of John D. Sands, plaintiff in the above entitled cause: That I have been such authorized agent since prior to June 21st, 1887, on which date the said Elmira Knepper purchased of the Sioux City & St. Paul Railroad Company the Northwest quarter of Section nine (9) township No. ninety-five (95) North, of Range No. forty-two (42) West of the fifth P. M., being the land involved in the above entitled suit; that since prior to the purchase of said land, I have had active and continuous charge of the interest and business of my said wife in connection therewith, and personally know more about the litigation in relation thereto between my said wife and the plaintiff, than does my said wife, the defendant, and therefore I am more competent to make this affidavit than she; and I depose and say that the

Demurrer to be filed in this cause by defendant's counsel is not to be filed therein for the purpose of delay.

WM. H. KNEPPER.

Sworn to before me and subscribed in my presence by the said W. H. Knepper this 6th day of May A. D. 1901.

[Seal] J. H. BOLTON,
Deputy Clerk of U. S. District Court.

Indorsed: No. 199. District Court of United States, Northern District of Iowa, Western Division. John D. Sands, plaintiff, vs. Elmira Knepper, defendant. Demurrer. Filed May 6, 1901. A. J. VanDuzee, Clerk. By J. H. Bolton, Deputy.

36 And afterward to wit on the 30th and 31st days of August, 1901, the following proceedings were had by said court in said cause, as appears of record on pages 70 and 71 of Record 3 of the record of said court, to wit:

John A. Sands,
vs. No. 199 Equity.
Elmira Knepper.

And now on this 30th day of August A. D. 1901, it being the time heretofore fixed therefor, the above entitled cause came on to be heard upon the demurrer of defendant to the bill of complainant filed herein, complainant appearing by M. B. Davis and J. H. King, his solicitors and defendant appearing by Struble & Struble, and thereupon the arguments of counsel is commenced and continued during the day.

John A. Sands,
No. 199. vs. Equity.
Elmira Knepper.

And now on this 31st day of August A. D. 1901, this cause again coming on for hearing, the arguments of counsel are resumed upon the demurrer to the bill, and being concluded the said demurrer is fully submitted and taken under advisement.

37 And on the 6th day of September, 1901, there was filed in the office of the Clerk of said Court in said cause, a written Opinion of the Court, which Opinion is in words and figures following, to wit:

In United States Circuit Court in and for Northern District of Iowa, Western Division.

John A. Sands,
vs. Equity.
Elmira Knepper.

Submitted on General Demurrer to Bill.

M. B. DAVIS,
KING & STEARNS,
for Complainant.
STRUBLE & STRUBLE,
for Defendant.

SHIRAS, District Judge.

The conclusions reached in the case of Manley vs. Tow substantially cover the vital points presented in this case and following the ruling announced in Manley vs. Tow, the demurrer to the bill is overruled.

Filed September 6, 1901. A. J. VanDuzee, Clerk.

38 The opinion heretofore referred to as being filed in case of Lottie M. Manley vs. Andrew Tow & Ellen Tow, is in words and figures following:

In United States Circuit Court Northern District of Iowa, Western Division.

Lottie M. Manley,
vs. Equity.
Andrew Tow and Ellen Tow.

Submitted on General Demurrer to the Bill.

J. H. KING,
M. B. DAVIS,
for Complainant.
W. P. JEWETT,
B. L. WICK,
CARR & PARKER,
for Defendants.

SHIRAS, District Judge.

This case and a number of other now pending in this court arise under the provisions of the act of Congress of March 3, 1887, providing for the re-adjustment of land grants in aid of railways and for the forfeiture of the unearned portions of such grants, the contest being between settles on the land claiming

under the homestead laws of the United States and purchasers from the Sioux City & St. Paul Railway Company. The bill herein filed sets forth at length the acts of Congress, of the General Assembly of the State of Iowa, of the Land Department, and the decisions of the Courts, State and Federal, which affect the disposition of the land described in the bill, to wit: The North West quarter of Section Twenty-five, Township Ninety-five North, of Range Forty-one West, situated in O'Brien County, Iowa.

39 By the recitals in the Bill it is shown that under date of May 12, 1864, Congress passed an Act granting to the State of Iowa for the purpose of aiding in the construction of a line of railroad from Sioux City to the South line of the State of Minnesota, every alternate odd numbered section of land within ten miles of the line of proposed road, with authority to the secretary of the Interior to select indemnity lands from the odd numbered sections within twenty miles of the lines named. In the same act Congress also granted to the State for the benefit of the McGregor Western Railway Company, lands to aid in the construction of the line of railway from McGregor westerly. It is declared in the Act (13 Statutes at Large 72) that the lands granted shall be subject to the disposal of the Legislature of Iowa, for the purposes named in the Bill and for no other, it being further provided that the lands granted should be disposed of by the State in the manner following, namely: "When the governor of the said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial, and workmanlike manner as a first-class railroad, then the Secretary of the Interior shall issue patents to the State in like manner for like number, * * * and when certificates of the completion of additional sections of ten consecutive miles of either of said roads are, from time to time made as aforesaid, additional sections shall be patented, as aforesaid, until said roads, or either of them are completed when the whole of the lands hereby granted shall be patented to the State for the uses aforesaid and none other. * * * Provided further that if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted to the State of Iowa for the purpose of securing the completion of the said road within such time, not to exceed five years and upon such terms as the state shall determine; and provided further, that said lands shall not in any manner be disposed of or incumbered, except as the same are patented under the provisions of this act, and should the state fail to complete said roads within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States."

40 By the provisions of the act of April 3, 1866, adopted by the General Assembly of Iowa, the Sioux City and St. Paul Railroad Company was authorized to undertake the construction of the line from Sioux City to the Minnesota State line, and that Company, beginning the construction at the State line, built the road to the Town of LeMars in Plymouth County, but no further, ceasing the work of construction in 1872. By an act approved March 16, 1882, the General Assembly of Iowa declared, "That all lands, and all rights to lands, granted or intended to be granted to the Sioux City and St. Paul Railroad Company, by said acts of Congress and of the General Assembly of the State of Iowa, which have not been earned by said railroad company by a compliance with the conditions of said grant, be, and the same are hereby absolutely and entirely resumed by the State of Iowa, and that the same be and are absolutely vested in said State as if the same had never been granted to said Railroad Company."

By an act approved April 2, 1884, the General Assembly enacted that all lands and rights to lands resumed by the act of 1882, were relinquished and conveyed to the United States, the Governor of the State being directed to certify to the Secretary of the Interior all lands patented to the State, but which had not been patented to the Sioux City and St. Paul Company by the State, it being however provided, "That nothing in this section contained shall be construed to apply to lands situated in the counties of Dickinson and O'Brien." The reason for this exception of the land in the named counties is to be found in the fact that the Chicago, Malwaukee & St. Paul Company had succeeded to the rights of the McGregor Western Company, the original beneficiary of the grant contained in the act of Congress of May 12, 1864, in aid of the line from McGregor Westerly, and as such successor had built the road up to and past the point of intersection with the Sioux City line and the Milwaukee Company was asserting a claim to the lands in O'Brien and Dickinson Counties on the ground that it had not received the full amount of lands it had earned and that upon the failure of the Sioux City Company to earn the same they
41 would pass under the grant to the McGregor Western.

It may be said in passing that this claim on part of the Milwaukee Company was denied by the ruling of the Supreme Court in the case of The Company vs. The United States, 159 U. S. 372, it being therein held that lands granted in aid of the line from Sioux City to the State line, but not earned by reason of the failure to construct the road between LeMars and Sioux City could not be claimed and held by the Milwaukee Company under the grant in aid of the line from McGregor Westward.

It may be further said that the rights of the companies in the lands within the overlapping limits of the grants at the place of intersection had been settled by the decision of the Supreme Court in the case of the Sioux City and St. Paul Railroad Company vs. The Chicago, Milwaukee & St. Paul Ry. Company, 117 U. S. 406, in pursuance of which a partition of the lands had been made and confirmed by a decree of the Circuit Court for the District of Iowa.

In 1890 a bill was filed in this court by the United States against The Sioux City and St. Paul Company for the purpose of adjusting the land grant under the provisions of the Act of Congress of March 3, 1887, and the case was carried to the Supreme Court, it being finally held by that Court that the Railway Company through its failure to complete the entire line to Sioux City, had not become entitled to claim all the lands embraced within the grants, but only the proportionate share based upon its completion of five sections of the road; that the facts showed that there had been patented to it by the State more land than it was entitled to and therefore the company was estopped from asserting any right or claim to the lands in O'Brien and Dickinson Counties which had been patented to the State, but had not been patented by the State to the Company, thus in effect holding that these lands were unearned through the failure to complete the road and as such they reverted to the United States under the terms of the original grant of 1864, as well as under the provisions of the act of 1887. The decision of the Supreme Court was under date of October 25, 1895.

42 Sioux City & St. Paul R. R. Co. vs. United States, 159 U. S. 349.

The Commissioners of the Land Office, by a letter dated November 18, 1895, called the attention of the Register and Receiver of the local office at Des Moines, Iowa, to the status of these lands, stating that the decision of the Supreme Court showed that the title thereof was in the United States, and the lands were subject to the disposal of the Department and to that end directed that a list of the lands be published with notice that the same would be subject to entry on a day to be named and that all persons making claim to any part thereof must give notice thereof and make proof thereof, and in cases of conflicting claims, the usual method of hearing the same would be followed. The complainant made claim to the land in dispute in this case under the provisions of the Homestead law, setting forth her settlement on the land, the continued occupancy and improvement thereof and giving proof of her qualifications to make the entry claimed. The defendant An-

drew Tow asserted a claim to the land under a contract of purchase made with the Sioux City and St. Paul Company under date of March 15, 1887. The contest thus initiated was heard in due form before the Register and Receiver of the local office and thence carried before the Commissioner of the Land Office, who found in favor of the complainant, giving her homestead entry a preference over the right asserted by Andrew Tow. The latter appealed the case to the Secretary of the Interior, who by an opinion filed Feb. 16, 1900 reversed the ruling of the Commissioner holding that under the proper construction of section four of the Act of Congress of March 8, 1887, the rights of Tow as a purchaser from the Railway Company were superior to those of complainant as a settler under the Homestead act and that Tow was entitled to a confirmatory patent for the land in dispute. The Secretary in his opinion states the facts to be that the complainant, Mrs. Manley with her husband, entered into possession of the land in July, 1885, at which time they established their residence thereon, which was continued until complainant was deserted by her husband from whom she obtained a divorce in 1890. That for a time after such desertion, complainant lived with her mother
43 on the adjoining land, but then resumed the actual occupancy of the premises, living thereon with her children; that the land had been cultivated and improved by the Manleys long prior to the date of Tow's contract to purchase and that when the contract of purchase was made Tow knew that the Manleys were in possession of the premises.

By the bill filed, the complainant challenges the construction placed by the Secretary of the Interior on the provisions of the act of 1887, claiming that it was an error of law to hold that the statute, as applied to the facts, gives the preference to Tow, whose contract of purchase was not made until after the date of the Act of March 3, 1887, and the purchase being of a tract of land which had never been conveyed to the Railway Company, and which had never been earned by the Railway Company under the terms of the grant of 1864, and which was in the actual possession of complainant as a settler when the contract of purchase was entered into by the defendant.

The defendants interpose a general demurrer to the bill and in support thereof some question has been made in the argument, upon the point whether the controversy is within the jurisdiction of the court, under the rule recognizing the finality of the action of the land department in the disposal of the public lands. It is well settled that the conclusiveness of the decisions of the land department is confined to matters of fact, or as is said by the Supreme Court in Moore vs. Robbins, 96 U. S. 530, that as to the facts upon which the decision of the depart-

ment is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question, but that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and imposition, "and in cases where it is clear that those officers have, by a mistake of the law, given to one man the land which on the undisputed facts belonged to another, to give appropriate relief."

The allegations in the bill do not charge that any fraud or imposition has been practiced upon the officers of the Land Department, and therefore the facts found by them cannot be questioned in this proceeding. The bill does charge, in effect, that the Secretary erred in his [his] construction of the act of 1887, and as a result of that error, he reversed the ruling of the Commissioner in favor of complainant and directed the issuance of a patent to the defendant and thus it is made plain that the controversy presents questions of law of which the court can rightfully entertain jurisdiction.

On behalf of complainant it is contended that under the peculiar language of the land grant, act of 1864, the State of Iowa had the right, upon the failure of the Company to complete the construction of the entire line of railway from Sioux City to the State line, to resume the unearned portion of the grant, and to regrant it for the purpose of securing the completion of the proposed road and therefore it must be held that when the State Legislature adopted the Act of 1882, resuming the unearned portions of the grant, it thereby adjusted this grant in such sense that it is excepted from the operation of the re-adjustment act of 1887, the first section of which directs the secretary of the Interior to immediately adjust "each of the land grants made by congress to aid in the construction of railroad and heretofore unadjusted."

While the action of the State undoubtedly affected the status of the lands and if the State, after the adoption of the resumption act of 1882, had regranted the unearned lands, specifically describing the same, to another company, thereby securing the completion of the line of railway, the rights of the latter might be measured by the action of the State, yet such regrant was not made and the United States continued to hold an interest therein, for under the terms of the grant of 1864, the unearned lands were to revert to the United States. Under these circumstances, it was open to the United States to ascertain the extent of the interest which the railway company had acquired in the lands embraced within the grant and to that end the Land Department could rightfully act under the power given

by the re-adjustment statute of 1887, which power and right was the basis of the suit brought by the Attorney General in the name of The United States against the Railway Company, and which, being carried to the Supreme Court, resulted,
45 as already stated, in the ruling that the company had no right to or title in the unearned lands. Without further consideration of this point it must be held that the rights of the adversary parties to this suit are to be determined by the construction of the act of 1887.

The first question to be considered is whether the provisions of section 4 of the act are applicable to persons who did not purchase lands from the Railway Company until after the adoption of the re-adjustment act of March 3, 1887. In the opinion filed by the Secretary of the Interior, it seems to be assumed that persons purchasing from the Railway Company after the adoption of the act are entitled to the same protection as are those who bought before the passage of the act.

Section 4 declares, "That as to all lands, except those mentioned in the foregoing section, which have been sold by the grantee company to citizens of the United States * * * the person or persons so purchasing in good faith his heirs, or assigns shall be entitled to the land so purchased * * *"

It will be kept in mind that one of the purposes of the Act of 1887 as declared in its title, was to provide "for the forfeiture of unearned lands" and the question presented by the facts of this case is whether Congress, when it undertook to provide the means whereby lands not earned under the terms of the grants and which, in all good faith, belonged to the United States, should be restored to the public domain it nevertheless intended to recognize the right of third parties to purchase the unearned lands from the defaulting companies, without providing any limit of time upon such right, and furthermore to give to such purchasers preference over actual settlers in possession of the lands so purchased.

In the case, already cited, of The Sioux City & St. P. Co. vs. United States, 159 U. S. 349, it is said: "If the terms of an act of Congress, granting public lands, admit of different meanings, one of extension and the other of limitation, they must be accepted in a sense favorable to the grantor, and if rights claimed under the government be set against it, they must be so clearly defined that there can be no [that there can be no] ques-
46 tion of the purpose of Congress to confer them, Leavenworth &c R. R. Co., vs. U. S. 92 U. S. 733-740.

Acts of this character must receive such construction as will carry out the intent of Congress, however difficult it might be

to give full effect to the language used if the grants were by instruments of private conveyances, Winona & St. Peter R. R. vs. Barney, 113 U. S. 618-625. Nothing is better settled, this court has said, than that statutes should receive a sensible construction, such as will effectuate the legislative intent, and if possible, so as to avoid an unjust or an absurd conclusion. Lau OW Bew vs. United States, 114 U. S. 47-59.

Giving effect to these rules of statutory interpretation, we cannot suppose that Congress intended that the railroad company should have the benefit of more lands than it earned."

The natural construction of the words used in the fourth section, to wit, "That as to all lands * * * which have been sold by the grantee company" would limit the application of the section to the lands that had been sold previous to the date of the act; if it be held that the section applies also to the lands sold after the act took effect, then by construction the rights of the grantees and purchasers holding under it are enlarged as against the rights of the grantor, to wit, The United States.

Furthermore if the provisions of Section four are held to apply to unearned lands sold after the adoption of the resumption act of 1887, then it will result in giving the preference to speculating purchasers over actual settlers, who have spent time, labor and money in the building up homes upon these lands and will be a complete reversal of the rule heretofore followed by Congress by the Land Department and by the Courts in dealing with the disposition of the public domain, to wit, to give the preference to the actual settler.

Thus in Lytte vs. Arkansas, 9 How 314, it is said, speaking of a claim under the pre-emption statute, "It is founded in an enlightened public policy, rendered necessary by the enterprise of our citizens. The adventurous pioneer, who is found in advance of our settlements, encounters many hardships
47 and not infrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed 160 acres. That this is the National feeling is shown by the course of legislation for many years."

In Clements vs. Warner, 24 How 396, it is declared that "The policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become purchasers of a limited extent of land, comprehending their improvements, over that of any other person."

In Rector vs. Gibbons, 111 U. S. 276, it is said, "Whenever Congress has relieved parties from the consequences of defects

in their title, its aim has been to protect those, who, in good faith, settled upon public land and made improvements thereon. * * * There has been in this respect in the whole legislation of the county, a consistent observance of the rules of National right and Justice.'"

In Northern Pacific Railroad vs. Amacker, 175 U. S. 564, we find the statement that "It was long ago said by this court 'that the policy of the Federal Government in favor of settlers upon the public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements over that of any other person.' Clement vs. Warner, 24 How 394-397, and in a later case that 'The law deals tenderly with one who in good faith, goes upon the public lands with a view of making a home thereon.' Ard vs. Brandon, 156 U. S. 537."

In Moss vs. Dowman, 176 U. S. 413, the declaration is that "The obvious purpose of the pre-emption and homestead statutes of the United States is to secure to the actual settler the land upon which he has settled, and to give him the prior right to perfect title by purchase or continued occupation.

While undoubtedly under the provisions of the statutes and the regulations of the land department there are opportunities for a speculator to obtain title to public lands, it must be always remembered that in the eye of the public land laws of the United States the speculator is never an object of
48 favor. Pre-emption and homestead laws were enacted for the benefit of the actual settler, and to that end they should be construed and administered. The plaintiff herein contends that this tract of land was withdrawn for five years from settlement by mere successive entries in the land office, and could be kept thus withdrawn in the future indefinitely, while speculators wait such time as it becomes convenient to them to perfect title by settlement and occupation.

The proposition thus made is so offensive to the spirit and purpose of the land laws of the United States, that unless the statutes make such a result necessary from a true construction of their language it ought to be rejected. Again and again has this court affirmed the proposition that the settler is the beneficiary of the pre-emption and homestead laws of the United States."

A construction of the readjustment act of 1887 which would result in giving preference to persons whose claims originally after actual possession had been taken by the settler, would certainly be against the rule followed in all previous legisla-

tion, and in the judicial decisions based thereon and could not be justified unless the language of the act is so clear to that end, that the legislative intent to change the existing rule is clearly manifested.

I can conceive of no equity existing in persons purchasing portions of the unearned lands after the time, when Congress, by adopting the acts of 1887 had declared its purpose to forfeit the unearned lands, which calls for protection either against the United States or against actual settlers whose occupancy and improvements antedate the purchase from the delinquent railway company, and in view of the settled rules that in the construction of grants of the public domain in cases of doubt the interpretation most favorable to the government must be adopted, and as between rival claimants, preference will be given to the actual settler, there seems to be no reason calling for an enlarged construction of section four of the act, so as to extend its benefits to persons who have become purchasers of portions of the unearned lands after the date
49 of the adoption of the act. It is not meant by this that one purchasing after the adoption of the act may not have equities which will be recognized under some circumstances, but the view taken is that such a purchaser cannot avail himself of the provisions of section four, which gives to the purchaser of lands "which have been sold by the grantee company" a right to a patent relating back to the date of the original certification or patenting, and thus enables the purchaser to defeat the rights and equities of third parties coming into existence before the date of the purchase but subsequent to the date of the original certification or patenting to the Railway Company.

If the construction of section four thus indicated be the correct one, it follows that the Secretary of the Interior, erred in holding, as a matter of law, that the defendant Tow, who did not become a purchaser of the land in dispute until after the adoption of the act of 1887, was entitled to a patent under the provisions of section four, thus preferring him over the rights and equities of complainant which had attached to the land long prior to the date of Tow's purchase.

If, however, the construction indicated of Section four cannot be sustained, then we are brought to a consideration of the meaning of the words,—certified or patented by the United States to or for the use or benefit of any company,—for in section five of the act it is declared "That where any said company shall have sold to citizens of the United States * * * as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed

in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States * * * and thereupon patents shall issue therefor to the said bona fide purchasers, his heirs or assigns. Provided, that all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of
50 adverse claimants under the preemption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned; as to which excepted lands the said preemption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor."

The lands in dispute in this case are coterminous with the completed sections of the railway are of the odd numbered sections named in the original grant, but, in effect, have been excepted from the operation of the grant, by reason of the failure to construct the road from LeMars to Sioux City and hence it follows that if they have not been conveyed to or for the use of The Sioux City and St. Paul Company within the meaning of section five, the rights of the homestead claimant must be preferred over those of the purchaser from the company.

It will be remembered that the state of Iowa never conveyed or transferred to the railway or to any one for its use or benefit, the unearned lands in O'Brien and Dickinson Counties. These lands were patented to the State, it being recited in the patent that they were for the use and benefit of the Sioux City and St. Paul R. R. Co., but owing to the failure of the Company to complete the line from LeMars to Sioux City the State refused to patent them to the company and the legal title thereto never passed to the Company.

It is strongly contended on part of the defendant that the transfer to the State was a conveyance for the use and benefit of the company, but the true intent and meaning of this patent is to be derived from a consideration of its real purpose and of the authority with reference to this grant conferred by the Act of Congress of 1864 upon the Land Department and the State of Iowa. The Act of Congress did not name the Sioux City & St. Paul Company as the grantee or beneficiary of the donation thereby made. The act granted the lands to the State of Iowa as a Trustee to secure the building of a line of railway from Sioux City to the Minnesota State line, and it is expressly declared in the act that the lands are granted to the State, "Subject to the disposal of the Legislature of Iowa for

the purposes aforesaid and no other" and in the 4th Sec
51 tion of the Act it is declared, "That if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the State of Iowa for the purpose of securing the completion of said roads within such time, not to exceed five years, and upon such terms as the State shall determine and provided further, that said lands shall not in any manner be disposed of or be incumbered except as the same are patented under the provisions of this act."

It would have been a violation of the terms of the grant, if the State had conveyed these unearned lands to the company. The Secretary of the Interior had no authority to issue a patent of the lands to the State except for the purposes of and subject to the limitations contained in the grant and therefore the patent issued to the State must be construed in the light of the limitations contained in the Act of Congress which was the source of the authority of the Secretary with respect to these lands.

The statement in the patent that the lands named therein are conveyed to the State for the use and benefit of the Railway Company means only that the lands are conveyed to the State to be disposed of for the use and benefit of the Railway Company according to the provisions of the original grant. If the Company had earned the lands by completing the entire line of railway provided for in the grant, then it would have been the duty of the State to have conveyed the lands to the company, but it was equally the duty of the State not to convey the lands to the company except as they were earned under the terms of the grant and the company having failed to earn them it acquired no title or right, legal or equitable thereto, and it became the duty of the State to hold the lands for the benefit of the United States, to whom they reverted under the express provisions of the Act of 1864. Thus in the case of the Sioux City & St. Paul Company vs. United States, 159 U. S. 349, it is said by the Court, "Another contention is, that upon the issuing of the patents of 1872 and 1873, to the State for the
use and benefit of the railroad company the title vested
52 absolutely in the company, and the lands were thereby freed from restraint of alienation from conditions subsequent or from liability to forfeiture. In support of this contention reference is made to Bybee vs. Oregon & California Railroad, 139 U. S. 663, 674-7; Van Wyck vs. Knevals, 106 U. S. 360; Wisconsin Central Railroad vs. Price County, 133 U. S. 496; Desert Salt Co. vs. Tarpey, 142 U. S. 241; St. Paul & Pacific Railroad vs. Northern Pacific Railroad, 139 U. S. 116. But these are cases, as an examination of them will show, in

which the grant was directed to the railroad company, or in which the act of Congress required that the patents for the lands earned should be issued, not to the state for the benefit of the railroad company, but directly to the company itself. In the case now before us, the statute directed patents to be issued to the state for the benefit of the company. So that, until the state disposed of the lands, the title was in it, as trustee, and not in the railroad company. Schulenberg vs. Harriman, 12 Wall 44-59; Lake Superior Ship Canal &c Co. vs. Cunningham, 155 U. S. 372. See also McGregor &c Railroad vs. Brown, 39 Iowa, 655; Sioux City & St. Paul Railroad vs. Osceola County, 43 Iowa 318-321. In the case last named the Sioux City Company was relieved from the payment of taxes upon some of the lands patented to the State for its benefit, upon the ground that the legal title was in the state, and the lands for that reason were not taxable; the question is altogether different from what it would be if patents for these lands had been issued, or if the state had conveyed them directly to that company."

As I construe section five, it was intended thereby to give the preference to claimants under the homestead and the preemption laws, whose rights of occupancy were in existence at the date of the purchase from the railway company, as to all unearned lands, the title to which had not been conveyed to the Company or for its use to some third party.

To give the preference to the purchaser under the provisions of this Section, it must appear that at the date of the sale to him by the Railway Company the title to the land purchased had been conveyed by the United States to the Company
53 or to some one for its use and benefit. A conveyance by the United States of land to a third party as a Trustee, to be held by the Trustee in order to ascertain whether the railway company will earn the lands, it being the duty of the Trustee to reconvey the lands to the United States, if the conditions of the grant are not performed, is not conveyance to the Company or for its use within the meaning of section five of the readjustment act. The mere transfer of the land to the State as a Trustee did not vest a title thereto in the Railway Company, nor did the company ever occupy a position which enabled it to rightfully demand a conveyance of the lands from the State.

It is well known that the company made vigorous efforts to secure a conveyance of the lands from the state but wholly failed. In the case of The Sioux City and St. Paul Co. vs. The County of Osceola, 43 Iowa 318, a case arising under the same grant, it was held by the Supreme Court of Iowa, "That as the

performance of the conditions annexed to the grants by the state was left to the determination of the governor of the State, the railroad companies acquired no property in the land granted until the governor had issued a patent or certificate, as required by the statute showing that the corporations had earned the lands by the completion of the road, or part thereof, as prescribed by the conditions of the grant."

A person purchasing any part of these unearned lands from the company would be making a purchase from a grantor in whom the title had not vested as a matter of law and who had not created an equitable claim to the lands by performance of the conditions of the grant and by such a purchase the legal title would not pass to the purchaser, nor would he thereby become possessed of an equity superior to the actual settler who was in possession of the premises at the date of the purchase. If this is the correct construction of this section, then it follows that if the complainant was, at the date of the purchase by the defendant Tow, a bona fide occupant of the premises under the homestead laws, she is entitled to be preferred in the disposition of this land.

54 The only objection urged against the good faith of the occupancy upon which the complainant bases her claim, is that at the time such occupancy began, the land was withdrawn from entry by operation of the grant contained in the act of 1864, and the action of the Land Department based thereon, it being contended that she was a mere trespasser upon the premises.

This question is put at rest by the ruling of the Supreme Court in Lake Superior &c. Co. vs. Cunningham, 155 U. S. 354, wherein it is said, "But it is said by the counsel for the company that it was not a bona fide homestead claim because at the time the defendant entered upon the land he understood that it was a part of a railroad grant. * * * If he did, he knew that this railroad grant had been outstanding thirty-two years, that the land was to be restored to the government if the road was not completed within ten years, and that twenty-two years had passed since the time fixed by Congress for the completion of the road, and nothing had been done. His expectation was (and under the circumstances not an unreasonable one), that Congress would at some new time interfere to remove all this outstanding claim.

Under those circumstances, and in expectation of such removal, he enters upon the land. Can it be said that this entry and occupation was with the view of depriving anybody of the title, or that it was, as against the company a wrongful entry? If the construction contended for were accepted, it would ex-

clude from the benefit of the act any settler upon these lands who knew that the land he entered upon was within a railroad grant. But legislation respecting the public lands is to be construed favorably to the actual settler, and the construction contended for by the canal company seems to us too narrow.

If a party entering upon a tract, although he knew that it was within the limits of an old railroad grant, did so under the honest belief and expectation that the grant, if not technically extinguished by lapse of time, had remained so long unappropriated by any beneficiary that Congress would shortly resume it,—and in that belief determined to make for himself a home thereon, with a view of perfecting his title under the
55 land laws of the United States when the forfeiture should be finally declared, it must be held, we think, that he is, within the terms of this confirmatory act, a bona fide claimant of a homestead."

In the case at bar, the facts are that the Manley's settled upon the land in dispute in July, 1885, long prior to the date of the purchase by the defendant. There was therefore no claim to bar the right of entry by the Manleys, except such as might be asserted on behalf of the Railway Company under the grant of 1864, but the company had ceased work in 1872, and the state had declared a forfeiture of the unearned lands in 1882, and therefore the Manleys might well assume that the lands would in due time be restored to the public domain, as in fact they were and therefore, under the ruling in the case just cited, the complainant must be held to be a bona fide claimant of a homestead and as such to be protected under the provisions of Section five of the act of 1887.

Can it be said, under the facts of this case, that the defendant Tow is a bona fide purchaser within the meaning of the term as used in section five.

In the case of the United States vs. Winona &c. Railroad, 165 U. S. 463, the acts of 1887 and 1896 were under consideration and it was therein held that "Our conclusion is that these acts operate to confirm the title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceeding of the land department, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the grants, although within the limits of the grants, excepted from their operation providing that he purchased in good faith, paid value for the lands, and providing also, that the lands were public lands in the statutory sense of the term, and free from individual claims."

In the case of the Winona Railroad vs. United States, 165 U. S. 433, it is said referring to the acts of 1887 & 1896, "It is essential to the protection of these statutes, that the party purchasing from the railroad company has no notice by any fact subsequently to and independent of the certification or patent of any defect in title. Such a purchaser cannot claim to be one in good faith if he has notice of facts outside of the records of the land department disclosing a prior right."

56

It is true that in the case just cited the court was dealing with a case wherein the rights of the settlers had attached before the right of the railway company under the grant, but the ruling is to the effect that the purchaser will be bound by notice of facts existing outside the records of the land department. In other words these acts do not change the ordinary rule that one who buys land, which at the time is in the actual and known possession of a third party, is chargeable with notice of the rights of such occupant.

Therefore when the defendant Tow entered into the contract of purchase with the railway company, which was on the 15th of March, 1887, he knew that the complainant was in the open actual possession of the land, using the same as a home for herself and her family. To defeat the rights of the complainant, he must become the purchaser of a title which was superior to and would defeat the rights of complainant under the homestead laws of the United States. The title he in fact bought was that of the railway company and at the time of the purchase this alleged title was of no avail against the rights of the complainant.

At the date of the contract of purchase, entered into by the defendant in 1887, the company had wholly ceased work on the road for fully fifteen years. The title to the land had never been conveyed to the company. In 1882 the state had resumed the unearned lands and the resumption act of 1887 had been adopted. It cannot therefore be said in any just sense, that the defendant was a bona fide purchaser of these lands, as against the rights of the complainant she being an actual settler and claimant under the homestead act.

It is the fact of actual settlement for the purpose of creating a home that creates the equity which is given priority in the disposition of the public domain, and this actual occupancy may be based upon a purchase from the railway company as well as upon an entry under the pre-emption or homestead laws of the United States. This was the principle recognized in the case of Linkswiler vs. Schneider, 95 Fed. Rep. 203. In that case the facts were that Schneider had

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purchased the land in dispute in that case from the railway company in 1883, had entered into the open occupancy thereof and had spent time, labor and money in building a home upon the premises and then in 1896, Linkswiler endeavored to make an entry of the land as a homestead in the land office at Des Moines, which entry was refused by all the departments in the land office, and the ruling was affirmed by this court. In the case now under consideration the settler claims under the homestead laws, but that difference does not weaken the weight to be given to the fact that the complainant was in the actual and known possession of the land when Tow endeavored to create a right thereto by entering into a contract of purchase with the railway company.

A person cannot be deemed to be a bona fide purchaser or a bona fide [entry-mean] under the homestead law, if at the time he makes his purchase from the railway company or attempts to make an entry in the land office, another person is in the actual open and known possession of the land. In other words, under such circumstances the would be purchaser or entry-man is charged with notice of the rights and equities of the actual occupant.

In the case at bar the conclusion reached is that as it is shown that when Andrew Tow made his contract of purchase with the railway company the complainant was in the actual and open possession of the premises to the knowledge of the defendant Tow, the latter cannot, as against the complainant, be deemed to be a bona fide purchaser of the premises, and furthermore that the land in dispute, being part of the unearned lands, had not been conveyed to the Railway Company, or for its use, within the meaning of section five of the act of 1887, and as the defendant did not enter into the contract of purchase until after the adoption of the act of 1887, and until after the unearned lands had been declared to be forfeited by the Legislature of Iowa, he cannot be held to be a purchaser in good faith in such sense that he is to be preferred over
58 the complainant.

If the conclusion- thus reached are well take-, it follows that the construction given to the provisions of the act of 1887, by the Secretary of the Interior cannot be sustained as a matter of law, and the allegations of the bill show that it was an error of law to award the confirmatory patent to the defendant. In other words the bill makes a case entitling the complainant to relief in equity against the erroneous issuance

of the patent to defendant and the demurrer must be therefore overruled.

Filed September 6, 1901. A. J. VanDuzee, Clerk.

59 And afterwards, on the 6th day of September, 1901, and the 1st day of October, 1901, the following proceedings were had by said court in said cause as appears of record on pages 72 and 84 of Record No. 3 of said Court, to wit:

John A. Sands,
No. 199. vs. Equity.
Elmira Knepper.

And now on this 6th day of September, 1901, the demurrer to the bill of complaint in the above entitled cause having been fully argued by counsel and duly submitted and taken under advisement by the court, and the court being now fully advised in the premises, finds that said demurrer should be overruled.

Accordingly it is the order and judgment of the court that the demurrer to the Bill of Complaint herein be and the same is hereby overruled, to which ruling the defendant duly excepts.

John A. Sands,
No. 199. vs. Equity.
Elmira Knepper.

And now on this 1st day of October A. D. 1901, leave is granted by the court to defendant to answer by the December Rule Day.

60 And on the 2nd day of December, 1901, there was filed in the office of the clerk of said Court in said cause, an election by defendant to stand on Demurrer, which is in words and figures following, to wit:

In United States Circuit Court in and for the Northern District of Iowa.

John A. Sands, Plaintiff,
vs.
Elmira Knepper, Defendant.

Election of Defendant to Stand on Demurrer.

And now comes the defendant in the above entitled cause and makes her election to stand upon the demurrer and the ruling thereon and requests an exception to such ruling to be given in the decree to be hereafter prepared and signed.

STRUBLE & STRUBLE,
Attorneys for Defendant.

Filed December 2nd, 1901. A. J. VanDuzee, Clerk; by J. H. Bolton, Deputy.

61 And on the 10th day of December, 1901, the following proceedings were had by said court in said case, as appears of record on page 135 of Vol. 3 of the record of said Court, to wit:

John A. Sands,
No. 199. vs. Equity.
Elmira Knepper.

This case coming before the court this 10th day of December, 1901, and it appearing that a demurrer to the Bill of Complaint had been heretofore filed, and after argument by counsel, had been overruled by the court, to which ruling the defendant at the time duly excepted, and the defendant having elected to stand upon the demurrer thus filed, and not to further plead in said cause, and the court, being fully advised in the premises, now finds that the complainant is entitled to the relief prayed for in his Bill of Complaint herein filed; it is therefore now ordered, adjudged and decreed that the complainant John A. Sands, is entitled to claim and hold the North West quarter of Section Nine (9) Township Ninety-five North, of Range Forty-two West of the 5th P. M., situated in O'Brien County in the State of Iowa, as a homestead by him duly entered in the year 1885, and occupied since that date and again by him entered in the United States Land Office at Des Moines, Iowa, on the 10th day of March, 1896, and that the right and title of said complainant to said land is paramount and superior to the title claimed by the defendant Elmira Knepper, through a purchase made by her from the Sioux City and St. Paul Railway Company under date of June 21, 1887, and it is therefore further adjudged and decreed that the confirmatory patent issued by the Land Department to the defendant Elmira Knepper, for said realty, based upon the purchase by her of said realty from the Sioux City and St. Paul Railway Company, is hereby annulled, canceled and set aside, and adjudged to be of no effect against the claim and title of the complainant and it is further adjudged and decreed that any and all title or right apparently vested in the defendant

62 Elmira Knepper by virtue of the patent so issued to her by the Land Department for the realty above described is held by said defendant in trust for the complainant herein as the real owner of said realty and the said Elmira Knepper is hereby directed and requirtd within a reasonable time to execute and deliver to the complainant a proper deed or instrument in writing, duly acknowledged releasing to complainant all apparent title held by her in said

realty, and the complainant is further authorized to hereafter move the court for such relief and orders as may become necessary to secure the transfer of the title to said realty to the complainant, jurisdiction over the case and over the defendant being retained for that purpose and it is further adjudged and decreed that complainant have and recover from the defendant the costs hereof, taxed at $36.39 and have execution therefor.

To which several rulings, orders, and decrees the defendant duly excepts.

O. P. SHIRAS, Judge.

63 And on the 17th day of March 1902 there was filed in the office of the Clerk of said Court, in this cause a Petition for Appeals; An Assignment of Errors, and a Bond for costs, which are in words and figures following, to wit:

In United States Circuit Court, Northern District of Iowa Western Div.

John A. Sands Plaintiff, Respondent
No. 199. vs. Equity.
Elmira Knepper Defendant, Appellant.

Appeal & Allowance.

The above named defendant, Elmira Knepper, conceiving herself aggrieved by the order and decree entered on December 9th, 1901, in the above entitled proceeding doth hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Eighth Circuit, and she prays that this, her appeal, may be allowed; that a transcript of the record and proceedings and papers upon which said order and decree were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

J. S. STRUBLE,
Attorney for defendant & Appellant Elmira Knepper.

LeMars Iowa, March 8, 1902.

And now to-wit this March 15, 1902 it is ordered that the appeal be allowed as prayed for.

O. P. SHIRAS, Judge.

Indorsed: U. S. Circuit Court Northern District of Iowa; John A. Sands vs. Elmira Knepper; Petition for appeal and allowance. Filed March 17, 1902. A. J. VanDuzee, Clerk.

64 In the United States Circuit Court in and for Northern District Iowa, Western Division.

John A. Sands Plaintiff, Respondent
No. 199. vs. Equity.
Elmira Knepper Defendant, Appellant.

Assignment of Errors.

Comes now the appellant, Elmira Knepper, and files the following assignment of errors, upon which she will rely upon her appeal from the decree made by this Honorable Court on the 9th day of December 1901.

1.

That the United States Circuit Court in and for the Northern District of Iowa, Western Division, erred in overruling the demurrer interposed by defendant, the plaintiff in eror, to the original complaint filed in said cause, because and upon the following grounds:

1. Because, as shown by said bill and particularly by paragraph thirteen thereof, the plaintiff in August 1884, tendered to the officers at the U. S. Land Office at Des Moines Iowa, a homestead filing for the land in controversy, with the necessary legal fees therefor, which said filing, as appears from said paragraph thirteen, was refused but the bill fails to aver that an appeal was ever taken from said ruling, by reason of which foregoing facts the appellant now alleges that there was an adjudication of all rights, claims and equities of the said John A. Sands, in and to said land or any part thereof.

2. Because it is shown by said bill, and particularly by paragraph sixteen thereof, that after the attempted homestead filing upon said land by said John A. Sands, as is set forth in division 1 of this assignment, and after the rejection of said attempted filing, the said John A. Sands voluntarily appeared before the United States Land Officers in Des Moines Iowa, in person and with counsel on the 20th day of March 1896, as a party to a contest case involving said land and the rights of said parties thereto, and, as shown by the bill, a trial
65 was had upon evidence taken and produced thereat in favor of said John A. Sands and this appellant in support of their respective claims, to wit, that of said John A. Sands as a good faith occupant of said land and one duly qualified to make homestead entry thereof under the homestead laws of the United States, and the appellant as a good faith purchaser of said land on June 21st, 1887 of the Sioux City and St. Paul Railroad Co., under and by virtue of an Act of Congress approved March 3rd 1887, it being further shown

by said bill that a decision was made by said land officers in favor of said John A. Sands, but that on appeal by the appellant herein from a later decision of the Honorable Commissioner of the General Land Office affirming the decision of the Land Officers, to the Honorable Secretary of the Interior, the said two prior decisions herein referred to were reversd and an order issued for a patent in favor of the appellant upon her compliance with the law and regulations governing such applications.

3. Because the bill fails to set forth any of the testimony taken in said contest cause from which it might, if an error had been committed cognizable by a court of equity, be made to appear to the court whether an error upon the facts shown by the evidence had been committed, or a mistake or fraud had been committed; and because the bill fails to point out and make plain any error of law or misconstruction of the Acts of March 3, 1887 and of March 2, 1896, or either or any part thereof, in their application by the honorable Secretary of the Interior, to the facts in said contest case.

4. Because as shown by said bill there was a full investigation of all claims and rights of the appellant and said John A. Sands in and to said land by the Land Department of the Federal Government with the final result that the purchase of said land by the appellant herein made June 21st, 1887, was declared to be in good faith and a patent directed to issue to her upon a compliance with the law and regulations governing such applications, which hearing and decision the appellant claims to have been a full and complete adjudication of
66 all questions which were, or might have been, presented by either the appellant, or said John A. Sands, at the hearing of said contest, and both of said parties are bound by said decision.

5. Because, it is not made to appear by the bill that a patent has ever isued to the appellant, but simply that one was ordered to issue upon her compliance with the law and regulations governing such applications and for aught that appears by the bill the appellant has not fully complied with such law and regulations and hence said land department still has control of the question of the issuance of the patent, under which circumstances a court of equity cannot hear and determine any question in relation to the issuance of the patent.

6. Because the court has no jurisdiction upon the allegations of the bill in relation to the issuance of the patent, the bill failing to show that the patent was issued or that the appellant has complied with the requirements of the decision of the honorable secretary of the Interior upon the questions as presented in said contest case.

7. Because the bill shows affirmatively that the appellant purchased said land in good faith and agreed to pay therefor a valuable consideration, a large part of which, as shown by the bill, was paid before the institution of this suit.

8. Because the bill fails to show, or to make any charge whatever of bad faith on the part of the appellant in this case in the purchase of said land from the railroad company.

9. Because by the Act of Congress approved March 3rd 1887, the appellant acting in good faith, and others acting in good faith in similiar cases had the legal right to purchase said land on the date on which the appellant purchased said land, to wit, June 21st, 1897.

10. Because by section one of Chapter 29 of the Acts of the 54th Congress passed at the first session thereof and approved March 2, 1896 it is provided among other things, that no patent to any lands held by a bona fide purchaser shall be vacated or annulled but the right and title of such purchaser is thereby confirmed.

67 11. Because by section 3 of the aforesaid Act of Congress approved March 2, 1896 it is provided in effect, that if, at any time prior to the institution of suit by the Attorney General of the U. S. to cancel any patent or certification of land erroneously patented or certified, a claim or statement be made to the Secretary of the Interior by any person claiming that such a person is a bona fide purchaser of such land by deed, contract or otherwise from or through the original patentee or corporation to which said patent or certification was made, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is invesigated in said Department of the Interior, and if it shall appear that such person is a bona fide purchaser then no such suit shall be instituted and the title of such claimant shall stand confirmed; and because the bills shows that the appellant in this case did make such claim of good faith purchase of the land in controversy to the Secretary of the Interior through the contest case set out in the bill prior to any such suit being brought and instituted by the Attorney General and that the appellant's claim to said land as such good faith purchaser was recognized and confirmed, therefore appellant's patent, or right to a patent was thereby confirmed.

12. Because there is no equity in the bill.

13. Because it is shown by the bill, in Exhibit "A" thereof, that among other things, the grant of Congress of May 12, 1864 of lands to the State of Iowa to aid in the construction of the two railroads mentioned therein was never adjusted

until the decision of the Supreme Court of the United States rendered Oct. 21, 1895 in a cause entitled the Sioux City and St. Paul Railway Co. vs. The United States.

14. Because as shown by the bill and particularly Exhibit "A" thereof, the honorable Commissioner of the General Land Office, prior to the institution of the contest cause set forth in the bill, decided and directed the applications of all
68 applicants to the land in controversy conferred no rights upon them and such applications were rejected and denied and no appeal therefrom was ever taken, so far as the bill shows, to the Secretary of the Interior.

15. In order that the foregoing assignments of error may be and appear of record, the appellant, Elmira Knepper, presents the same to the court, and prays that such disposition be made thereof as in accordance with law and equity and the statutes of the United States in such cases made and provided, and appellant prays a reversal of the decretal order and decree overruling her demurrer and rendering a decree against her as entered by said Court.

J. S. STRUBLE,
Solicitor for Appellant, Elmira Knepper.

Indorsed: In United States Circuit Court Northern District of Iowa Western Division. John A. Sands, Plaintiff, Respondent vs. Elmira Knepper Defendant, Appellant. Equity No. 199. Assignment of Error. Filed March 17, 1902. A. J. VanDuzee, Clerk.

69 Cost Bond.

Know All Men by These Presents: That we, Elmira Knepper, W. H. Knepper and W. H. Sleeper, of O'Brien County Iowa, are held and firmly bound unto John A. Sands, in the full and just sum of One Thousand Dollars to be paid to the said John A. Sands, his heirs, executors administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 8th day of March in the year of Our Lord, One Thousand Nine Hundred and Two.

Whereas, lately at the October Term Nineteen Hundred and one of the Circuit Court of the United States for the Eighth Judicial District, in the Northern District of Iowa, and the Western Division thereof, in a suit depending in said court between John A. Sands, plaintiff and the above bounden Elmira Knepper, defendant, decree was rendered against the said defendant and the said defendant has obtained an appeal

of said cause of the Honorable O. P. Shiras, the District Judge of the United States Court in and for said Northern District of Iowa before whom said cause was tried, on the demurrer of the defendant to the bill or petition of the said John A. Sands, and by whom said decree was rendered upon said demurrer and of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said John A. Sands, citing and admonishing him to be and appear [to be and appear] in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis Missouri, sixty days from and after the date of said Citation.

Now the condition of the above obligation is such that if the said Elmira Knepper shall prosecute said appeal to effect and answer all damages and costs, if she fail to make good her plea then the above obligation to be void, else to remain in full force and virtue.

ELMIRA KNEPPER, [Seal.]
W. H. KNEPPER, [Seal.]
W. H. SLEEPER, [Seal.]

Presence of
Luella Burton,
F. D. Meridith.
Approved by
O. P. SHIRAS, Judge.

70. State of Iowa,
O'Brien County—ss.

We do solemnly swear that we are residents and freeholders of the State of Iowa and we each for ourselves say that we are individually worth the sum of Two Thousand Dollars, beyond the amount of our debts, and have property liable to execution in this State equal to the sum of One Thousand dollars.

W. H. KNEPPER,
W. H. SLEEPER.

Subscribed in my presence and sworn to before me this 8th day of March 1902 by the said W. H. Knepper and the said W. H. Sleeper.

WM. H. WEBER,
Notary Public in and for said County and State.

Indorsed: Bond of Elmira Knepper in the case of John A. Sands Plaintiff, Appellee vs. Elmira Knepper, Defendant Appellant. Filed March 17, 1902. A. J. VanDuzee, Clerk.

71 The United States of America, To John A. Sands—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the Western Division of the Northern District of Iowa, wherein Elmira Knepper is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Circuit Court U. S. Northern District of Iowa.

Witness, the Honorable O. P. Shiras Judge of the Circuit Court of the United States for the Northern District of Iowa, this 17th day of March in the year of our Lord one thousand nine hundred and two.

O. P. SHIRAS,
United States District Judge, for the Northern District of Iowa.

No. 199 Eq. United States Circuit Court, Western Division of the Northern District of Iowa. John A. Sands vs. Elmira Knepper. Citation. Filed March 21st, 1902. A. J. VanDuzee, Clerk.

The within writ came into my hands for service on March 19, 1902, and I served the same personally on John A. Sands at his residence 5 miles East of Hospers in O'Brien County, Ia., on March 19, 1902 by reading the same to John A. Sands and handing to him a true copy of same.

Marshal's fees..... $2.00
Marshal's expenses.. 6.20

$8.20

Fees paid by Elmira Knepper.

EDWARD KNOTT, U. S. Marshal.
By J. A. Tracy, Deputy.

72 United States of America,
Northern District of Iowa.

I, A. J. VanDuzee, Clerk of United States Circuit Court in and for the Northern District of Iowa do hereby certify that the foregoing transcript contains full, true and complete copies of the record and proceedings in the case of John A.

Sands, Complainant vs. Elmira Knepper Respondent, No. 199 Equity, as full, true and complete as the original of the same remain of record and on file in my office.

I further certify that the Original Citation with the return of service endorsed thereon, is hereto attached and returned herewith.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said U. S. Circuit Court at my office in Dubuque Iowa this 16 day of April 1902.

Circuit Court
U. S.
Northern District
of Iowa.

A. J. VANDUZEE,
Clerk U. S. Circuit Court Northern District of Iowa.

Filed Apr. 23, 1902. John D. Jordan, Clerk.

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(Appearance for Appellant.)

And on the twenty-eighth day of April, A. D. 1902, an appearance of counsel for appellant was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals.
Eighth Circuit.
No. 1751.

Elmira Knepper,
Appellant,
vs.
John A. Sands,

The Clerk will enter my appearance as Counsel for the Appellant.

I. S. Struble.

(Endorsed.): U. S. Circuit Court of Appeals, Eighth Circuit No. 1751. Elmira Knepper, Appellant, vs. John A. Sands, Appearance. Filed Apr. 28, 1902. John D. Jordan, Clerk. I. S. Struble, Le Mars, Iowa, Counsel for Appellant.

(Appearance for Appellee.)

And on the twenty-ninth day of May, A. D., 1902, the appearance of Mr. John H. King as counsel for appellee was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals.
Eighth Circuit.
No. 1751.

Elmira Knepper,
Appellant,
vs.
John A. Sands,

The Clerk will enter my appearance as counsel for the Appellee.

John H. King, Att'y.
Huron, S. Dak.

(Endorsed): U. S. Circuit Court of Appeals, Eighth Circuit. No. 1751. Elmira Knepper, Appellant, vs. John A. Sands. Appearance.

(Appearances for Appellant.)

And on the twenty-eighth day of April, A. D. 1902, an appearance of counsel for appellant was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals.
Eighth Circuit.
No. 1751.
Minira Chapper,
Appellant,
vs.
John A. Gumbs,
The Clerk will enter my appearance as Counsel for the Appellant.
I. B. Stirrible.
(Endorsed.): U. S. Circuit Court of Appeals, Eighth Circuit No. 1751. Minira Chapper, Appellant, vs. John A. Gumbs, Appearance. Filed Apr. 28, 1902. John D. Jordan, Clerk. I. B. Stirrible, Le Mars, Iowa, Counsel for Appellant.

(Appearances for Appellee.)

And on the twenty-ninth day of May, A. D. 1902, the appearance of Jr. John H. King as counsel for appellee was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals.
Eighth Circuit.
No. 1751.
Minira Chapper,
Appellant,
vs.
John A. Gumbs,
The Clerk will enter my appearance as counsel for the Appellee.
John H. King, Att'y.
Marion, O. Dak.
(Endorsed): U. S. Circuit Court of Appeals, Eighth Circuit. No. 1751. Minira Chapper, Appellant, vs. John A. Gumbs. Appearance.

Filed May 29, 1902. John D. Jordan, Clerk. John H. King, Huron, S. Dak., Counsel for Appellee.

(Appearance for Appellee).

And on the seventeenth day of November, A. D. 1902, the appearance of Mr. M. B. Davis as counsel for the appellee was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals.
Eighth Circuit.
No. 1751.

Elmira Knepper,
Appellant,
vs.
John A. Sands,

The Clerk will enter my appearance as counsel for the Appellee.

M. B. Davis.

(Endorsed): U. S. Circuit Court of Appeals, Eighth Circuit, No. 1751. Elmira Knepper, Appellant, vs. John A. Sands, Appearance. Filed No. 17, 1902. John D. Jordan, Clerk, M. B. Davis, Counsel for John A . Sands, Appellee.

(Argument Commenced.)

And on the tenth day of December, A. D., 1902, in the record of the proceedings in said Circuit Court of Appeals is an entry in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals.
Eighth Circuit. December Term, 1902.
Wednesday, December 10, 190

Elmira Knepper,
Appellant.
vs.
No. 1751
John A. Sands,

Appeal from the Circuit Court of the United States for the Northern District of Io

This cause having been called for hear

Filed May 20, 1902. John B. Jordan, Clerk.
John H. Kline, Haynes, S. Pal., Counsel for Appellee.

(Appearances for Appellee).

And on the seventeenth day of November, A. D. 1902, the appearance of Mr. L. B. Davis as counsel for the appellee was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals.
Eighth Circuit.
No. 1731.

Minta Knepper,
Appellant,
vs.
John A. Banks,
Appellee.

The Clerk will enter my appearance as counsel for the Appellee.
L. B. Davis.
(Endorsed): U. S. Circuit Court of Appeals,
Eighth Circuit, No. 1731. Minta Knepper,
Appellant, vs. John A. Banks, Appearance.
Filed No. 17, 1902. John B. Jordan, Clerk.
L. B. Davis, Counsel for John A. Banks,
Appellee.

(Argument Commenced.)

And on the tenth day of December, A. D. 1902, in the record of the proceedings in said Circuit Court of Appeals in an entry in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals.
Eighth Circuit. December Term, 1902.

Wednesday, December 10, 190

Minta Knepper,
Appellant.
vs.
No. 1731
John A. Banks,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Io

This cause having been called for hear

ing in its regular order, argument was commenced by Mr. I. S. Struble in behalf of the appellant, but the hour of adjournment having arrived before the conclusion of the arguments, the further hearing of this cause was postponed until to-morrow morning.

(Order of Submission)

And on the eleventh day of December, A. D. 1902, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals.
Eighth Circuit. December Term, 1902.
Thursday, December 11, 1902.

Elmira Knepper,
Appellant.
No. 1751. vs.
John A. Sands.

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

This cause having been called this day for further hearing, argument was continued by Mr. John H. King and Mr. H. H. Davis for the Appellee and concluded by Mr. I. S. Struble for the appellant.

Thereupon the cause was submitted to the Court upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(Order to Certify Questions to Supreme Court, etc.)

And on the twenty-fifth day of February, A.D. 1903, in the record of the proceedings of said Circuit Court of Appeals is an order to certify certain questions to the Supreme Court in said cause, which said order and questions so certified are in words and figures following, to-wit:

United States Circuit Court of Appeals.
Eighth Circuit. December Term, 1902.
Wednesday, February 25, 1903.

(Order of Submission)

And on the eleventh day of December, A. D. 1902, in the record of the proceedings of said Circuit Court of Appeals in an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals.
Eighth Circuit. December Term, 1902.

Thursday, December 11, 1902.

Clerk's Exception.

Appellant.

vs. } No. 1734.

Peter A. Brady. }

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

This cause having been called this day for further hearing, argument was continued by Mr. John F. King and Mr. H. H. Davis for the appellee and concluded by Mr. I. S. Struble for the appellant.

Thereupon the cause was submitted to the Court upon the transcript of record from said District Court and the briefs of counsel filed herein.

(Order to Certify Questions to Supreme Court, etc.)

And on the twenty-fifth day of February, A.D. 1903, in the record of the proceedings of said Circuit Court of Appeals in an order to certify certain questions to the Supreme Court in said cause, which said order and questions so certified are in words and figures following, to-wit:

United States Circuit Court of Appeals.
Eighth Circuit. December Term, 1902.

Wednesday, February 25, 1903.

Elmira Knepper,
Appellant.
No. 1751. vs.
John A. Sands.

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

In this cause it is now here ordered that certain questions arising upon the record be and the same are hereby ordered to be certified to the Supreme Court of the United States under the provisions of section six of the act of Congress approved March 3, 1891, for the instruction of the said Supreme Court to this Court upon said questions.

Said Certificate is as follows, to-wit:

United States Circuit Court of Appeals.
Eighth Circuit.

Elmira Knepper,
Appellant.
vs.
John A. Sands,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

The United States Circuit Court of Appeals for the Eighth Circuit sitting at the City of St. Louis, Missouri, on the 28th day of February, 1903, certifies that from the record on file in the above entitled cause, which is pending in this Court on an appeal duly taken to review a decree rendered in said ~~Circuit~~ action in favor of John A. Sands, the Appellee, and is undetermined, the following facts are made to appear:

That by an Act of Congress approved May 12, 1864, it was "enacted in the Senate and House of Representatives of the United States of America, * * * that there be, and is hereby granted, to the State of Iowa, for the purpose of aiding in the construction of a railroad from Sioux City, in said State, to the south line of the State of Minnesota, at such points as the said State of Iowa may select between the Big Sioux and the West Fork of the

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

In this cause it is now here ordered that certain questions arising upon the record be and the same are hereby ordered to be certified to the Supreme Court of the United States under the provisions of section six of the act of September twenty-second, 1922, for the instruction of the said Supreme Court in this cause upon said questions.

Said Questions is as follows, to-wit:

United States Circuit Court of Appeals.
Eighth Circuit.

Murry Thurpeer,
Appellant.
vs.
John A. Gerde,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

The United States Circuit Court of Appeals for the Eighth Circuit sitting at the city of St. Louis, Missouri, on the 26th day of February, 1923, certifies that from the record on file in the above entitled cause, which is pending in this Court on an appeal duly taken to review a decree rendered in said District Court in favor of John A. Gerde, the Appellee, and in which judgment, the following facts are made to appear:

That by an Act of Congress approved May 29, 1924, it was provided in the Courts and Judges of Procedure Act of the United States and Territories, = = = that there be, and is hereby created, in the State of Iowa, for the purpose of sitting in the construction of a District Court of the United States, in said State, to the south line of the State of Minnesota, at such points as the said State of Iowa may select between the Missouri and the West fork of the

Des Moines River, also in said State for the use
and benefit of the McGregor Western Railroad
Company, for the purpose of aiding in the constructi
of a railroad from a point at or near the foot of
Main street, South McGregor, in said State in
a westerly direction, by the most practicable route
on or near the forty-third parallel of North
latitude until it shall intercept the said road runni
from Sioux City to the Minnesota State line, in the
County of O'Brien, in said State every alternate sec-
tion of land designated by off numbers for ten
sections in width on each side of said road, but,
in case it shall appear that the United States
have, when the lines or routes of said roads are
definitely located, sold any section or part there-
of granted as aforesaid or that the right of pre-
emption or homestead settlement has attached to
the same, or that the same has been reserved by
the United States for any purpose whatever, ,
then it shall be the duty of the Secretary of the
Interior to cause to be selected for the purposes
aforesaid, from the public lands of the United
States nearest to the lines of sections above speci-
fied, so much land in alternate sections, or
parts of sections, designated by odd numbers,
as shall be equal to such lands as the United
States have sold, reserved or otherwise appropri-
ated, or to which the right of homestead settlement
or pre-emption has attached, as aforesaid, which
lands thus indicated by odd numbers and sections
by the direction of the Secretary of the Interior
shall be held by the State of Iowa for the uses
and purposes aforesaid, Provided, That the lands
so selected shall in no case be located more than
twenty miles from the lines of said roads, Pro-
vided, Further, That any and all lands heretofore
reserved to the United States by an act of Congress
or in any other manner by competent authority for
the purpose of aiding in any object of internal
improvement or other purpose whatever, be and the
same are hereby, reserved, and excepted from
the operation of this act; except so far as
it may be found necessary to locate the routes
of said roads through such reserved lands, in
which case the right of way shall be granted,
subject to the approval of the President of
the United States. . . . . .

. . . . . .

Sec. 4. And be it further enacted, That the lands hereby granted shall be subject to the disposal of the legislature of Iowa, for the purposes aforesaid and no other. And the said railroads shall be, and remain public highways for the use of the government of the United States.

Sec. 4. And be it Further Enacted, That the lands hereby granted shall be disposed of by said State, for the purposes aforesaid only, and in manner following, namely: When the Governor of said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of either of said roads is completed in good, substantial, and workmanlike manner, as a first-class railroad, then the Secretary of the Interior shall issue to the State, patents for one hundred sections of land for the benefit of the road having completed the ten miles aforesaid. When the Governor of said State shall certify that another section of ten consecutive miles shall have been completed as aforesaid, then the Secretary of the Interior shall issue patents to said State in like manner, for a like number; and when certificates of the completion of additional sections of ten consecutive miles of either of said roads are, from time to time, made as aforesaid, additional sections of land shall be patented as aforesaid, until said roads, or either of them, are completed, when the whole of the lands hereby granted shall be patented, to the State for the uses aforesaid, and none other. Provided, That if the said McGregor Western Railroad Company, or assigns shall fail to complete at least twenty miles of its said road during each and every year from the date of its acceptance of the grant provided for in this act, then the State may resume said grant, and do dispose of the same as to secure the completion of a road on said line and upon such terms, within such time as the State shall determine; Provided Further, That if the said roads are not completed within ten years from their several acceptances of this grant, the said lands hereby granted and not patented shall revert to the State of Iowa for the purpose of securing the completion of the said roads within such time, not to exceed five years, and

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upon such terms as the State shall determine; And Provided Further, that said lands shall not in any manner be disposed of or incumbered except as the same are patented under the provisions of this act, and should the State fail to complete said road within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States.

Sec. 5. And Be it Further Enacted, That as soon as the Governor of said State of Iowa shall file or cause to be filed with the Secretary of the Interior maps designating the routes of said roads, then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act."

. . . . . .

That on April 3, 1866, the State of Iowa accepted said grant and on the same day, by appropriate legislative action, conferred that part of the grant made in aid of the construction of a railroad from Sioux City to the south line of the State of Minnesota, upon the Sioux City & St. Paul Railroad Company, a corporation duly organized and existing under and by virtue of the laws of said State, said grant being made upon the terms, conditions and restrictions contained in the aforesaid Act of Congress; that the said Railroad Company accepted said grant from the State and entered upon the construction of its road but only completed five sections of ten miles each, extending from the Minnesota State line southward to the town of Le Mars and received from the State of Iowa the amount of land it was entitled to by reason of the construction of such part of its road; that in a message to the Legislature of the State of Iowa, delivered in January, 1882, the Governor of the State directed the attention of the Legislature to the fact that the Railroad Company aforesaid had failed to complete its road in accordance with the terms of the grant and advised the legislature of his refusal to convey any more lands to said Railroad Company because it had received all the lands that it was entitled to and recommended that appropriate

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gislative action be taken; that thereafter, March 16, 1882, the following act was adopt- by the Legislature of the State of Iowa, which s duly approved by the Governor:

"AN ACT, TO RESUME ALL THE LANDS AND RIGHTS NVEYED UPON THE SIOUX CITY & ST. PAUL RAILROAD MPANY, BY OR UNDER AN ACT OF CONGRESS APPROVED Y 12, 1864, TO LANDS NOT HERETOFORE EARNED BY ID COMPANY.

Whereas, by an Act of Congress approved y 12, 1864, entitled, 'An Act for a grant of lands the State of Iowa, in alternate sections to d in the construction of a railroad in said ate,' certain lands were granted to the State Iowa for the purpose of aiding in the construction of a railroad from Sioux City in said State, the south line of Minnesota, at such point as said State might select, between the Big Sioux d the west fork of the Des Moines River, which nt was made to, and accepted by, the State of a, upon the conditions, restrictions and qualifications therein named, and

Whereas, by an act of the General Assembly the State of Iowa, approved April 3, 1866, so h of the lands, interests, rights, powers and ivileges as were or might be conferred in pursance of said acts of Congress, to aid in the construction of the aforesaid road, were disposed of, nted, and conferred upon the Sioux City & Paul Railroad Company, and

Whereas, said Sioux City & St. Paul Company ly accepted said grant on the 20th day of Septber, A. D., 1866, but has failed to complete or use to be completed any road on the line adopted refor, from Sioux City to Le Mars, in said State Iowa, or any road in lieu therpof,

Be It Enacted by the General Assembly of State of Iowa:

Sec. 1. That all lands, and all rights to nds, granted or intended to be granted to the ux City & St. Paul Railroad Company by the d acts of Congress and of the General Assembly the State of Iowa, which have not been earned said railroad company by a complainse with the nditions of said grant, be, and the same are reby absolutely and entirely

resumed by the State of Iowa, and that the same bee and are absolutely vested in the said State as if the same had never been granted to said railroad company.

Sec. 2. This act being deemed of immediate importance shall take effect and be in force from and after its publication in the Iowa State Register and the Sioux City Journal newspaper published in the State of Iowa.
Approved March 16, 1882."

That thereafter by an act of the Legislature of the State of Iowa, which took effect April 2, 1884, the State relinquished to the United States all of its right, title and interest in the lands pertaining to the grant in aid of the Sioux City & St. Paul Railroad Company, which had been declared vested in the State by virtue of the act aforesaid, approved March 16, 1882, and authorized the Governor of the state to certify, to the Secretary of the Interior, a list of all lands which had been theretofore patented to the State to aid in the construction of the Sioux City & St. Paul Railroad Company, which lands had not been earned and had been declared forfeited to the State but said Act contained the provision "that nothing in this (act) contained shall be construed to apply to the lands situated in the Counties of Dickinson and O'Brien";.

It further appears that prior to the adoption of the Act of March 16, 1882, the State of Iowa, acting through its executive officers, had caused a computation to be made of the lands to which the Sioux City & St. Paul Railroad Company was entitled under the grant aforesaid, and of the lands patented to the State on that account and of the lands actually conveyed by the State to said Company and also caused a computation to be made of the lands pertaining to the grant held by the State, which had neither been conveyed to the Railroad Company or earned by it, and that upon such computation it appeared that said Railroad Company had received conveyances from the State for 322,412-81/100 acres of land, which was all that it was entitled to according to the terms of the grant and that the State still held the legal title to 85,457-41/100 acres of land pertaining

pensed by the State of Iowa, and that the same be and are absolutely vested in the said State as if the same had never been granted to said railroad company.

Sec. 2. This act being deemed of immediate importance shall take effect and be in force from and after its publication in the Iowa State Register and the Sioux City Journal newspaper published in the State of Iowa.

Approved March 16, 1882."

That thereafter by an act of the Legislature of the State of Iowa, which took effect April 3, 1884, the State relinquished to the United States all of its right, title and interest in the lands pertaining to the grant in aid of the Sioux City & St. Paul Railroad Company, which had been conferred and vested in the State by virtue of the act aforesaid, approved March 16, 1882, and authorized the Governor of the state to certify, to the Secretary of the Interior, a list of all lands which had been theretofore patented to the State to aid in the construction of the Sioux City & St. Paul Railroad Company, which lands had not been earned and had been declared forfeited to the State but said Act contained the provision "that nothing in this (act) contained shall be construed to apply to the lands situated in the Counties of Dickinson and O'Brien".

It further appears that prior to the adoption of the Act of March 16, 1882, the State of Iowa, acting through its executive officers, had caused a computation to be made of the lands to which the Sioux City & St. Paul Railroad Company was entitled under the grant aforesaid, and of the lands patented to the State on that account and of the lands actually conveyed by the State to said Company and also caused a computation to be made of the lands pertaining to the grant which had by the State, which had neither been conveyed to the Railroad Company or earned by it, and that upon such computation it appeared that said Railroad Company had received conveyances from the State for 382,418.91/100 acres of land, which was all that it was entitled to according to the terms of the grant and that the State still held the legal title to 85,457.09/100 acres of land pertaining

o said grant, no part of which had at that time
een earned by the Railroad Company or conveyed
o it or has ever since been earned; that the
ast named quantity of land so unearned and un-
onveyed consisted in part of the tract of land in
ontroversy in this action, to-wit: Section 9,
ownship 95, North of Range 42, West of the Fifth
rincipal Meridian, situated in O'Brien County,
owa.

It further appears that the tract of land in
ontroversy remained open and unoccupied until
bout one year subsequent to the passage of what
s termed the relinquishment act aforesaid of
pril 2, 1884, at which time it was settled upon
y John H. Sands, the appellee, who erected a
ouse and made improvements thereon of the value
f $1750., with a view of establishing a home-
tead in accordance with the laws of the United
tates and who has ever since resided upon said
and, claiming it as a homestead; that he made
n application to the proper land office to enter
t as a homestead, sometime in the year 1884,
ut his application was rejected, and he renewed
uch application on March 10, 1896, after the
ecretary of the Interior in a published circular
f date November 18, 1895, had declared the
and in controversy, and other like land, subject
o disposal by the land department of the United
tates.

It further appears that when the last ap-
lication to enter the land was made, his claim
as contested in the local land office by Elmira
nepper, the appellant in this case; that said
lmira Knepper asserted a right to the land in
irtue of a purchase of the same by her from the
ioux City & St. Paul Railroad Company, which
as made on June 21, 1887, and in virtue of
he provisions of the fourth section of the Act
f Congress making provision for the adjustment of
ailroad land grants and other purposes, which
as approved March 3, 1887 (vide 24 St. 556, c.
76); that the said Elmira Knepper had never, at any
ime, resided upon the land in controversy or
ultivated the same or in any manner attempted
o comply with the homestead laws of the United
tates for the purpose of obtaining a title to it
hereunder; that the controversy thus in-

said grant, no part of which had at that time been granted by the Railroad Company or conveyed it or has ever since been granted; that the said named quantity of land so unearned and unselected constituted in part of the tract of land in controversy in this action, to-wit: Section 9, township 83, North of Range 48, West of the Fifth Principal Meridian, situated in O'Brien County, [illegible].

It further appears that the tract of land in controversy remained open and unoccupied until [illegible] one year subsequent to the passage of what is termed the relinquishment act aforesaid of April 3, 1880, at which time it was settled upon [illegible] John H. Banks, the appellee, who erected a [illegible] house and made improvements thereon of the value of $1700.00, with a view of establishing a bona-fide residence in accordance with the laws of the United States and who has ever since resided upon said land, claiming it as a homestead; that he made application to the proper land office to enter said land as a homestead, sometime in the year 1884; that his application was rejected, and he renewed his application on March 10, 1886, after the [illegible] decision of the Interior in a published circular [illegible] date November 18, 1885. And defendant the said in controversy, and other like land, subject to disposal by the land department of the United States.

It further appears that when the land application to enter the land was made, his claim [illegible] contested in the local land office by Elmira Knapper, the appellant in this case; that said Elmira Knapper asserted a right to the land in virtue of a purchase of the same by her from the [illegible] Sioux City & St. Paul Railroad Company, which [illegible] made on June 23, 1887, and in virtue of [illegible] provisions of the Fourth section of the Act [illegible] Congress making provision for the adjustment of [illegible] land grants and other purposes, which approved March 3, 1887 (vide 25 St., 556, s. [illegible]); that the said Elmira Knapper had never, at any [illegible], resided upon the land in controversy or [illegible] the same or in any manner attempted to comply with the homestead laws of the United [illegible] for the purpose of obtaining a title to it [illegible]; that the controversy then in-

augurated as aforesaid between the parties to this action was tried and determined before the Register and Receiver of the local land office and resulted in a finding, by such officer, that John A. Sands, the appellee, by virtue of his settlement upon the land and continued residence thereon and cultivation thereof and his full compliance with the homestead laws of the United States, was entitled to a patent to said lands from the United States; that an appeal was taken from such decision by Elmira Knepper to the Commissioner of the General Land Office, who, on July 20, 1899, likewise decided that John A. Sands, the appellee, was entitled to a patent for said land; that a further appeal was taken by Elmira Knepper, to the Secretary of the Interior, who, on April 24, 1900, reversed the decision of the Register and Receiver and also the decision of the Commissioner of the General Land Office, and thereupon rejected the application of said Sands to enter the land as a homestead; that at the time the bill of complaint was filed in the present case, by John A. Sands against Elmira Knepper, the officers of the General Lands Office, acting in accordance with the decision of the Secretary of the Interior, were about to issue or had already issued a patent for the land in controversy to the said Elmira Knepper, solely in virtue of her alleged purchase of the land from the Sioux City & St. Paul Railroad Company on June 21, 1887, and in virtue of the fourth section of the adjustment act of March 3, 1887.

It further appears that from the bill of complaint that John A. Sands, the appellee, alleged that the action aforesaid, if taken, would be unlawful and contrary to law, wherefore he prayed that the commissioner of the General Land Office should be required to accept his proofs showing settlement upon and continuous cultivation of the land for the period of five years or more and that the patent to said land allowed to the defendant, Elmira Knepper, be either declared null and void or for a decree declaring that the defendant holds the legal title in trust for the appellee.

And the said Circuit Court of Appeals for the Eighth Circuit further certifies that the following questions of law, among others,

pursuant to aforesaid between the parties to the action was tried and determined before the Register and Receiver of the local land office and resulted in a finding, by such officer, that John Brede, the appellee, by virtue of his settlement upon the land and continued residence thereon and cultivation thereof and his full compliance with the homestead laws of the United States, was entitled to a patent to said lands from the United States; that an appeal was taken from such decision by Elmira Knepper to the Commissioner of the General Land Office, who, on July 20, 1899, likewise decided that John A. Brede, the appellee, was entitled to a patent for said land; that a further appeal was taken by Elmira Knepper, to the Secretary of the Interior, who, on April 24, 1900, reversed the decision of the Register and Receiver and also the decision of the Commissioner of the General Land Office, and thereupon rejected the application of said Brede to enter the land as a homestead; that at the time the bill of complaint was filed in the present cause, by John A. Brede against Elmira Knepper, the defendant, the Secretary of the General Land Office, acting in accordance with the decision of the Secretary of the Interior, were about to issue or had already issued a patent for the land in controversy to the said Elmira Knepper, solely in virtue of her alleged purchase of the land from the Sioux City & St. Paul Railroad Company on June 21, 1887, and in virtue of the fourth section of the adjustment act of March 3, 1887.

It further appears that from the bill of complaint that John A. Brede, the appellee, alleged that the action aforesaid, if taken, would be unlawful and contrary to law, wherefore he prayed that the commissioner of the General Land Office should be required to accept his proofs showing settlement upon and continuous cultivation of the land for the period of five years or more and that the patent to said land allowed to the defendant, Elmira Knepper, be either declared null and void or for a decree declaring that the defendant holds the legal title in trust for the appellee.

And the said Circuit Court of Appeals for the Eighth Circuit further certifies that the following questions of law, among others,

arise and are presented by the assignment of error in this cause; that the decision thereof is indispensable to a correct decision of the cause; and that to that end it desires the instruction of the Supreme Court upon the following questions and propositions of law, to-wit:

FIRST: In view of the provisions of the Act of Congress of May 12, 1864, by virtue of which the land in controversy was granted to the State of Iowa, did the action which was subsequently taken in manner and form aforesaid, by the governor and Legislature of the State of Iowa, operate as a final adjustment of the grant so far as the Sioux City & St. Paul Railroad Company was concerned and by virtue of its being so adjusted, exempt or except the grant in question from the provisions of the adjustment act of March 3, 1887?

SECOND: In view of the terms of the granting act of May 12, 1864, and the action subsequently taken in manner and form aforesaid by the State of Iowa acting through its Governor and Legislature, can Elmira Knepper, the appellant, be esteemed a purchaser in good faith or a bona fide purchaser of the land in controversy, within the meaning of the fourth section of the adjustment act of March 3, 1887, as against John A. Sands, the appellee, who was in the open possession of the land in controversy and had erected valuable improvements thereon in manner and form aforesaid when said purchase was made?

IN WITNESS WHEREOF, the undersigned Judges, Holding the said United States Circuit Court of Appeals for the Eighth Circuit, have hereunto set their hands this 25th day of February, A. D., 1903, at St. Louis, Missouri, and ordered that the foregoing certificates be filed in said United States Circuit Court of Appeals, and by the Clerk of said Court duly forwarded to the Supreme Court of the United States.

(Signed) Henry C. Caldwell,
Walter H. Sanborn.
Ames M. Thayer,
Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

(signed) Henry C. Caldwell,
Walter H. Sanborn,
Arba S. Thayer,
Judges of the United
States Circuit Court of
Appeals for the Eighth
Circuit.

United States Circuit Court of Appeals.
Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of Elmira Knepper, Appellant, vs. John A. Sands, Appellee, No. 1751. December Term, A. D., 1902, was duly filed and entered of record in my office by order of said Circuit Court of Appeals and as directed by said Court, the said Certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, this twenty-fifth day of February, A. D., 1903.

(Seal)

John D. Jordan,
Clerk United States Circuit
Court of Appeals for the
Eighth Circuit.

(Endorsed): U. S. Circuit Court of Appeals, Eighth Circuit, December Term, 1902. No. 1751. Elmira Knepper, Appellant, vs. John A. Sands. Certificate of Questions to the Supreme Court of the United States. Filed Feb. 25, 1903. John D. Jordan, Clerk.

21583

United States Circuit Court of Appeals.
Eighth Circuit.

I, John B. Jordan, Clerk of the United
States Circuit Court of Appeals for the Eighth
Circuit, do hereby certify that the foregoing
certificate in the case of Elmira Knepper, Ap-
pellant, vs. John D. Spade, Appellee, No. 1731,
September Term, A. D., 1902, was duly filed and
entered of record in my office by order of said
Circuit Court of Appeals and as directed
by said Court, the said Certificate is by me
transmitted to the Supreme Court of the United
States for its action thereon.

IN TESTIMONY WHEREOF, I hereunto subscribe
my name and affix the seal of said United States
Circuit Court of Appeals for the Eighth Circuit,
at the City of St. Louis, Missouri, this twenty-
fifth day of February, A. D., 1903.

(Seal) John B. Jordan,
Clerk United States Circuit
Court of Appeals for the
Eighth Circuit.

(Endorsed): U. S. Circuit Court of Appeals,
Eighth Circuit, December Term, 1902. No.
1731. Elmira Knepper, Appellant, vs. John
A. Spade. Certificate of Questions to the
Supreme Court of the United States. Filed
Feb. 25, 1903. John B. Jordan, Clerk.

(Clerk's Certificate)

United States Circuit Court of Appeals.
Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing seventy-three pages contain full, true and complete copies of all pleadings, proceedings, and record entries, in a certain cause wherein Elmira Knepper was Appellant and John A. Sands was Appellee, No. 1751. December Term, 1902, is full, true, and complete as the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Circuit Court of Appeals, at office in the City of St. Louis, Missouri, in the Eighth Circuit, this twenty-second day of April, A. D. 1903.

John D. Jordan,
Clerk of the United States
Circuit Court of Appeals for
the Eighth Circuit.

(Seal of United States
Circuit Court of Appeals,
Eighth Circuit.)

(Clerk's Certificate)

United States Circuit Court of Appeals.
Eighth Circuit.

I, John D. Jordan, Clerk of the United
States Circuit Court of Appeals for the Eighth
Circuit, do hereby certify that the foregoing
seventy-three pages contain full, true and complete
copies of all pleadings, proceedings, and
record entries, in a certain cause wherein
[illegible] was Appellant and John A. Banks
is Appellee, No. 1791, December Term, 1902,
as full, true, and complete as the same remain
on file and of record in my office.

In testimony whereof, I hereunto sub-
scribe my name and affix the seal of said Cir-
cuit Court of Appeals, at office in the City of
St. Louis, Missouri, in the Eighth Circuit,
this twenty-second day of April, A. D. 1903.

John D. Jordan,
Clerk of the United States
Circuit Court of Appeals for
the Eighth Circuit.
[illegible] United States
Circuit Court of Appeals.
Eighth Circuit.)

21586

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 233.

ELMIRA KNEPPER, APPELLANT,

vs.

JOHN A. SANDS, APPELLEE.

On a Certificate of Questions Propounded by the Court of Appeals of the Eighth Circuit of the United States.

I. S. STRUBLE, *Attorney for Appellant.*
KING & STEARNS, *Attorneys for Appellee.*
M. B. DAVIS, *of Counsel for Appellee.*

APPELLANT'S BRIEF AND ARGUMENT.

STATEMENT.

While the questions for the determination by this court arise upon two interrogatories certified by the Court of Appeals; and while, as we suppose, this court will be largely guided by these interrogatories, we apprehend it will be desirous of obtaining all the light possible from such controlling facts as may be

contained in the bill, and hence we feel justified in asking the court to consider some of the more important facts falling, as we think, within the legitimate purview of the two questions propounded by the Appellate Court.

The action was brought by the appellee, John A. Sands, in the Eighth Circuit, Northern District of Iowa, Western Division, to recover the northwest quarter of section No. 9, in township No. 95 west, 5th principal meridian, situated in O'Brien County, Iowa, and to have cancelled a patent therefor, supposed at the commencement of the action to have been issued by the secretary of the interior to appellant, Elmira Knepper.

At the proper term of court, appellant's counsel filed a general demurrer to the bill, which, after argument, was overruled, exceptions being duly taken, and the cause appealed within time, to the United States Circuit Court of Appeals for the Eighth District, sitting in St. Louis, Mo. Argument upon the demurrer was heard by said court, and thereafter, and pending a final decision, the court certified the following two questions to the Supreme Court:

First. In view of the provisions of the act of congress of May 12, 1864, by virtue of which the land in controversy was granted to the State of Iowa, did the action which was subsequently taken in manner and form aforesaid, by the governor and legislature of the State of Iowa, operate as a final adjustment of the grant so far as the Sioux City and St. Paul Railroad Company was concerned, and by virtue of its being so adjusted, exempt, or except the grant in question from the provisions of the adjustment act of March 3, 1887?

Second. In view of the terms of the granting act of May 12, 1864, and the action subsequently taken in manner and form aforesaid by the State of Iowa, acting through its governor and

legislature, can Elmira Knepper, the appellant, be esteemed a purchaser in good faith, or a *bona fide* purchaser of the land in controversy, within the meaning of the fourth section of the adjustment act of May 12, 1864, as against John A. Sands, the appellee, who was in the open possession of the land in controversy and had erected valuable improvements thereon in manner and form aforesaid when said purchase was made?

The entire record of this cause has been certified up from the Appellate Court under Rule 37, and this court, therefore, has before it the bill, the demurrer, the opinion of the trial court, Hon. O. P. Shiras, and the decree.

ARGUMENT AND BRIEF.

It is our understanding of the rules of practice in this court that upon the certification of questions arguments may include reference to such material allegations in the bill as may throw light upon the questions propounded, and that such questions should not be so strictly construed as to preclude the counsel from a reference to such allegations as may in fact bear upon either of the questions propounded, and enable the court to more intelligently make answer to the questions; and with this understanding we shall endeavor to pursue a liberal, rather than a technical, construction of each question propounded.

I.

The first question, and to some extent the second, calls for a construction upon an important part of the act of May 12, 1864, and the two acts of the legislature of the State of Iowa designated in the certificate.

Before citing authorities we call attention to the granting

act. This was a grant of lands to the State of Iowa in trust for the purpose of securing, through the aid thereby afforded, the building of two railroads, one of which, and the only one material to this controversy, was to be built from Sioux City, Iowa, to the south line of the State of Minnesota at such point as said state might select between the Big Sioux and the West Fork of the Des Moines River (certificate, page 1). The lands granted were subject to the disposal of the legislature of Iowa. The manner in which this should be done is fully set forth in section 4 of the act (certificate, page 2). This section contains most important provisions, which bear forcibly upon the first question your honors are called upon to answer.

It will be noticed that it is provided that upon the completion of either of said roads patents should issue for the balance of the lands to which said company might be entitled "to the state *for the uses aforesaid and none other.*" * * * "Provided further, that if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the State of Iowa *for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms as the state shall determine;* and, provided further, that said lands shall not in any manner be disposed of or encumbered except as the same are patented under the provisions of this act, *and should the state fail to complete said roads within five years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States.*"

It is apparent that this grant did not contemplate that any of the lands included within its terms should be disposed of by the state for any other purposes than those named therein; also that should the state fail to complete said roads (after resuming

the lands referred to in case either company should fail to complete within ten years given within which to complete them, or either), then it should have no further power over them. The Sioux City and St. Paul Company has never completed its road. In 1872 it built south from the Minnesota line toward Sioux City as far as LeMars, Iowa, a distance of 53 13-100 miles. Nor has the State of Iowa ever taken any step toward securing the completion of the road.

By the granting act, if the roads were not completed within ten years from the date of the acceptance of the grant, it was provided that the lands granted and not patented should revert to the State of Iowa for the purpose of securing the completion of said roads within such time, not exceeding five years, upon such terms as the state might determine; and that if the state should for five years after the ten above referred to fail to complete the said road, then the lands undisposed of should revert to the United States. (Certificate, page 2.).

We maintain that it is perfectly plain from these provisions of the grant that the sole purpose was to accomplish the building of the two roads and to this end the state within a certain five-year period, on failure of either company to complete its road within a certain ten-year period, was given power to take up the incomplete project and complete it, making use, of course, of such lands as it might then hold, or thereafter receive from government for that purpose.

The State of Iowa accepted said grant April 3, 1866, and on the same day by appropriate legislation, conferred the land in controversy, and other lands, upon the Sioux City and St. Paul Company. (Certificate, page 3.) This company accepted the grant from the state on September 20, 1866. (Certificate, page 4.)

This latter date is the one from which the ten-year period, within which the company should complete its road, began to run; hence, according to the requirement of the congressional grant, this road should have been completed on September 20, 1876.

Thereafter, and within five years, or up to September 20, 1881, the state had the power to have the road completed as hereinbefore shown.

Instead of availing itself of this power within the time granted, it did nothing until March 16, 1882, when it passed an act resuming to itself all the lands which had not at that time been earned by the company. (Certificate, page 4.) But it will be seen from this act that no purpose to complete the road was contemplated by the state in passing said act, nor is it pretended, nor will it be claimed, that the state has ever taken a step to secure the completion of said road.

The state by the act of March 16, 1882, simply resumed to itself all the unearned lands pertaining to this road, and thereafter did absolutely nothing with or about them until the passage of the act of April 2, 1884, by which it relinquished to the United States all its right, title and interest in the lands so previously resumed, and authorized the governor to certify to the secretary of the interior a list of all lands theretofore patented to the state to aid in the construction of this road; but it was specially provided *"that nothing in this (act) contained shall be construed to apply to lands situated in the Counties Dickinson and O'Brien."*

This proviso is very significant. If it had any effect upon the lands in controversy and others in same condition, the effect was to retain the title thereto, and unless the United States has taken action to recover said lands, and has recovered them,

they remain in the state, and while the title is in the state no settler has ever had right of entry upon any of them.

It is certainly to be presumed from the fact of specifically retaining these lands the state did not intend that the United States should again become possessed of them; it is then immaterial what computation may have been made by state officials to ascertain the number of acres to which the Sioux City and St. Paul Company was entitled as between it and the state.

This was done prior to the act of the legislature of March 16, 1882, and the result was the state officials found that company had received 322,412.81 acres, which was all that it was entitled to receive according to the terms of the grant, and that the state still held the legal title to 85,457.41 acres pertaining to the grant to the Sioux City and St. Paul Company, no part of which had been earned by said company, or has since been earned; but, nevertheless, the state well knowing these facts, specially withheld from the United States which was alone entitled to receive them back, all the lands (and this land) situated in Dickinson and O'Brien Counties.

It cannot be shown that in the grant of May 12, 1864, nor in any subsequent act of congress, power was given the state of Iowa to thus assume control of these lands after fifteen years following their acceptance by this Sioux City and St. Paul Company. The state simply attempted to usurp power it did not possess, undoubtedly hoping congress would come to its relief and later give the lands to the state for some approved purpose. This was never done. Now while it may have been proper for the state to ascertain whether the company had received its proper quantity of lands so that a further and possibly unearned quantity might not be patented to it by the state, yet this ascertainment of quantity and the fact that the number of excess of lands

held by the state was also by the same process ascertained, it does not at all follow that the state did, or had, power to adjust the grant as between the company and the United States.

And the most satisfactory evidence that the United States did not consider that the grant had been adjusted between the government and the company is the fact that in 1890 the United States instituted suit in the Circuit Court of the United States for the Northern District of Iowa in the October term, 1890, against the Sioux City and St. Paul Railroad Company to recover these unearned lands. This action was carried to this court and decided by it in favor of the government October 21, 1895.

159 U. S., 349. 40 L. Ed., 171 and 178.

It will be noticed that this action was brought against the company and was not a proceeding in any form against the state.

That this suit and the result was by the United States regarded an adjustment of the grant of May 12, 1864, no one can reasonably controvert, particularly in the face of the circular letter of the secretary of the interior of date November 18, 1895, which clearly recognizes that the unearned lands remaining in the state for the benefit of the Sioux City and St. Paul Company were recovered in the suit above named. Transcript of record, page 17. It is there said, after a brief reference to what had taken place: "This leaves the title to the lands involved in the suit in the United States, and subject to disposal by the department," and following this, said department, in the same circular letter, gave specific directions for the restoration of said lands to the public domain and for their opening to settlement. (Transcript of record, page 17.)

And it will be noticed that, in order to avoid complications,

it was directed that the notice of restoration declare to all prior applicants that their applications conferred no rights upon them, and that upon the day set for the restoration of the lands, they would be opened to entry *and disposal* without regard to such prior applications, which, by the notice, should be held to be rejected. It was further provided that new applications might be presented and that in all cases of conflicting claims the register and receiver were directed to proceed in accordance with the rules of practice in contest cases. (Transcript of record, page 18.)

No attack is made by appellant upon the binding character of this circular; in short, it was acquiesced in by all parties. But prior to this time, and reasonably soon after settlers began to go upon these lands, certain of these persons made application to the secretary of the interior to have an action brought by the attorney general to have the title to these lands quieted in the United States, and with a view thereafter to make legal homestead entries thereon.

S. C. & St. P. R. R. Co. vs. U. S., 159 U. S., 349. 40 L. Ed., pages 177-180.

On July 26, 1887, the secretary rendered a decision on that application, in which he held that this grant—act May 12, 1864—*had not been adjusted.* The decision found that the Sioux City and St. Paul Railroad Company was still entitled to at least 4,101.88 acres out of 21,692.18 acres, as earned lands under the grant, and the secretary directed the commissioner of the general land office to make an adjustment of this grant in harmony with the findings made by him.

6 L. D., p. 54-71.

A demand was made upon the governor of Iowa for a conveyance back of these lands, failing to comply with which the

matter was referred to the attorney general of the United States, who brought the action to recover these lands found in 150 U. S., 349 ante. The land in controversy was a part of the land so recovered to the United States.

All these things go clearly to show that the government did not consider that the State of Iowa had adjusted this grant, or disposed of these lands.

But there is another and, as we think, a complete answer to appellee's claim that there was an adjustment of this grant between the government and the railroad company, or the State of Iowa, as a result of the action of the state legislature in passing the two acts of March 16, 1882, and of April 2, 1884, and that is the settled principle laid down by this court in Schulenberg vs. Harriman, 21 Wall., 44; 22 Law Ed., 551, in which it is declared that "No one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee but the grantor, or his heirs, * * * and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. No individual can assail the title it (the grant) conveyed on the ground that the grantee has failed to perform the conditions annexed." And on page 555, Law Ed., the court said: "If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property," etc.

Also see *Van Wyck vs. Knevals, 106 U. S., 360, 27 L. Ed., 201—sec. 204.*

Citing with approval Schulenberg vs. Harriman, ante.

Also see *U. S. vs. Southern P. R. Co., 146 U. S., 152, 36 L. Ed., 1091.*

See page 1101, where it is said: "No one but the grantor can raise the question of a breach of a condition subsequent." In U. S. vs Northern P. Ry. Co., 152 U. S., 284, 38 L. Ed., 443-449, on this last page the court says: "There can be no ques-"tion under the authorities cited, that if an act of forfeiture had "not been passed by congress the Atlantic and Pacific could yet "construct its road, and that constructing it, its title to these "lands would become perfect. No power but that of congress "could interfere with this right of the Atlantic and Pacific. No "one but the grantor can raise the question of a breach of con-"dition subsequent."

Also see following cases:

Grinnell vs. Chicago, Rock Island and Pacific R. Co., 103 U. S., 739, 26 L. Ed., 456.

U. S. vs. Northern Pac. R. Co., 177 U. S., 436, 44 L. Ed., 836.

U. S. vs. Tenn. & Coosa R. R. Co., 176 U. S., 242, 44 L. Ed., 452.

Bybee vs. Oregon & Cal. R. R. Co., 139 U. S., 676, 35 L. Ed., 305.

This last case holds that in case of a grant providing that all lands remaining unsold after ten years shall revert to the United States if road is not completed, does not *ipso facto* work a forfeiture on failure of completion.

Where lands are granted in aid of a railroad revert to the United States on failure to complete the road in ten years, those settling on such land after the ten years' limit and the non-completion of the road are possessors in bad faith, as the forfeiture can be insisted on only by the United States.

Vicksburg, S. & P. R. Co. vs. Elmore, 46 La. Ann., 1237, 15 Southern, 701.

And in same case held that where lands are granted in aid of a railroad, and the state is appointed a mere trustee, it cannot declare a forfeiture of the lands granted.

It seems to us that there being no power given the state by the granting act to make any adjustment, and there being no power in anyone, save the grantor, under the decision of this court to declare a forfeiture and effect an adjustment, the first question certified to this court must be answered in the negative.

II.

We now come to a consideration of the second question propounded by the court of appeals. In our judgment this question cannot properly be considered as a mere abstract proposition, but ought to be answered in the light of such allegations contained in the bill as are admitted by the demurrer, and as are material to the subject matter of the interrogatory.

Nor, in our opinion, should the question be considered solely upon the true facts embodied within it, viz: the terms of the granting act of May 12, 1864, and the action taken by the state of Iowa subsequent to May 12, 1864; nor yet alone upon the question and such statement of facts by the court of appeals as accompanies the question, because to thus adhere technically to the question and the two facts therein stated, might result in a denial of important rights of the appellant, which, upon the law and such material facts in the bill as are admitted by the demurrer (and only such facts as, under the rules of practice are admitted) filed in this cause.

For instance, and to make more plain our thought at this juncture, the bill makes no charge whatever of fraud against the appellant. It is not alleged nor intimated that by any deceit or circumvention, or any improper act whatsoever, the ap-

pellant mislead, or obtain an advantage, over the appellee.

There are no allegations against the appellant contained in the bill involving the least turpitude on her part. Aside from the occupancy and continued residence by the appellee upon the land in dispute and the non-occupancy and residence of the appellant thereon, the essential reasons why the appellee should be granted relief are to be found in paragraphs 15 and 17 of the bill. (Transcript of record, pages 13 to 15.) These are:

First. That appellant's contract was made after March 3, 1887.

Second. That the contract and lands affected thereby do not come within the terms of said act nor section 4 thereof.

Third. That title never vested in said company nor in any one for its use and benefit.

Fourth. The company had not earned the lands, nor entitled to them.

Fifth. The time within which it might earn them having long since elapsed.

Sixth. The state held the title under a special grant with power of adjustment and forfeiture, and had fully adjusted the grant and forfeited and resumed the lands.

Seventh. That said land grant was legally and fully adjusted long prior to the passage of the act of March 3, 1887.

Eighth. That this company had received the full amount of lands that it could receive, and the time having lapsed within which it could build the road or earn or receive more land.

Ninth. That the act of March 3, 1887, only applied to unadjusted land grants, and only to sales made in good faith prior to the passage of said act.

Tenth. The purchase by appellant was long after the foregoing things were done, and she was bound to take notice thereof,

and could not in law or equity be a good faith purchaser of the land.

Eleventh. Contract of purchase was void, same being contrary to provisions of the granting act of May 12, 1864, which prohibited the sale, transfer or encumbrance of said land until earned and patented to the company.

Twelfth. That at the time said purchase was made no sale or purchase could be made under the provisions of the act of March 3, 1887, nor could such a good faith purchase be made by appellant because of the acts of the State of Iowa in declaring that the company had already received all the lands it was entitled to receive and in forfeiting said lands to itself. (Par. 16 transcript, pages 13 and 14.)

Thirteenth. That by reason of long residence upon and cultivation of this land by appellee and his homestead rights and the premises, said appellee was and is entitled to have said land under the homestead laws of the United States.

Fourteenth. That the allowance of a patent to appellant is unlawful and contrary to law. (Par. 17 transcript, page 15.)

We challenge the attention of the court and counsel to the following statements:

First. That each of the foregoing allegations, except the first and fifth, is the statement of a mere legal conclusion not admitted by the demurrer.

Dillon vs. Barnard, 21st Wall., 430, 22 Law Ed., 673-677.

Louisville & N. R. R. Co. vs. Palmes, 109 U. S., 244, 27 Law Ed., 922-925.

Second. That neither of these various allegations, nor all combined, even were all admitted by the demurrer, amounts to a charge of affirmative fraud against the appellant. Appellant at

each argument below urged that no legal conclusion was admitted by the demurrer and said legal conclusions were pointed out. We wish to call the court's attention to another point as to which we think the court should be advised before it makes answer to this second question. The appellee is not entitled to a negative answer to this question because, among other things which will be stated later, when his application to enter the land as a homestead was rejected (certificate, page 5) it is not shown by the bill, nor will it be claimed by counsel, that he appealed from from such order of rejection; on the contrary, he submitted to the ruling and thereby became bound by it.

In re. Wesley A. Cook, Vol. 4, Decisions of the Secretary of the Interior, page 187.

Parker vs. Gray, Vol. 2 same decisions, page 570.

In the first of the above causes Cook filed in the local land office at Fargo Fitzgerald's formal relinquishment and at the same time attempted to file his own application, accompanied with proper affidavit and fee and commissions. The local land office, acting under circular instructions, transmitted the relinquishment to the commissioner of the general land office, and returned Cook's application papers and money to him. Fitzgerald's entry was cancelled April 3, 1884. On April 21, 1884, one Soules filed a regular application to enter the tract, and on April 22, 1884, Cook again attempted to file upon the tract which was rejected because of Soules' entry.

On appeal the secretary said: "But Cook failed to appeal from their action at that time, and by quietly waiting for the action of your office, has lost all rights that he might have perfected by diligence. The fact that now adverse rights have intervened will operate completely to bar his right to the land."

To same effect is the decision of the secretary of the interior

in Parker vs. Gray, above cited. The case involved an application of Gray to purchase the land, which application had been rejected, but no appeal was taken from the rejection, the appeal having been from an earlier ruling cancelling a former entry of his. The secretary held that he was concluded by failing to appeal from the order cancelling his entry, an adverse right having intervened.

In Burnham vs. Starkey (Kan.), 21 Pac., 624, the court, on page 629, said: "His (Starkey's) failure to appeal from the refusal of the land officers to allow him to enter the land, forbids him from asserting or maintaining a homestead claim," and it is added in substance, that the refusal of his entry could not have prevented him from prosecuting his homestead claim because he had a remedy by appeal if he had either equitable or legal rights.

Citing

Brown vs. White, Copp. Pub. Land Laws, 298, 299.

Schuster vs. Grady, Ibid., 314—Zab. Land Laws, 63.

These decisions are in harmony with the rules of the courts. In every case in which an appeal is allowable it must be taken and prosecuted, otherwise the aggrieved party is forever barred from thereafter asserting any interest in the question involved. No further citation of authorities is necessary.

In the further consideration of the second question we desire to call the court's attention in the first instance to the fact that by the provisions of the granting act the land was to be withdrawn from the market upon the filing of maps designating the routes of the roads (certificate, page 2). This was done. (Transcript 28.)

Thereafter and before the land had been opened to settlement by the land department the appellee settled upon the same.

Now did the settlement upon this land by appellee at this

time confer upon him any such rights, legal or equitable?

It is our understanding that no rights can be acquired under the pre-emption or homestead laws in lands withdrawn by order of the commissioner of the general land office.

Thompson vs. St. Paul & M. & M. Ry. Co., 83 Fed., 546.

Riley vs. Welles, 76 U. S., 248—9th Law Ed., p. 648.

Wood vs. Beach, 156 U. S., 548—39 L. Ed., 528.

Butts vs. N. P. R. R. Co., 119 U. S., 55—30 L. Ed., 330-7.

Woolsey vs. Chapman, 101 U. S., 755—25 L. Ed., 915. See page 920.

No pre-emption or homestead claim attaches to a tract of land until an entry in the local land office is made.

N. Pac. R. Co. vs. Coburn, 164 U. S., 385—41 L. Ed., 479.

Kan. Pac. R. Co. vs. Dunmeyer, 113 U. S., 629—28 L. Ed., 1122, 1127.

An order of the land department withdrawing from sale all lands in a certain district which have been granted for a railroad not yet located, is sufficient to defeat a subsequent pre-emption of land thus withdrawn, although more land was withdrawn than necessary.

Wolcott vs. Des Moines, etc., Co., 72 U. S., 681—18 L. Ed., 689.

Spencer vs. McDougall, 159 U. S., 62—40 L. Ed., 77.

Where one moved upon public land in October, 1866, but made no attempt to enter it as a homestead until the succeeding spring, and after the withdrawal of the same from entry and sale had been ordered by the secretary of the interior, he acquired no equitable rights superior to the legal title subsequently

conveyed to a railroad company, although he had permission from the register to occupy the land.

Maddox vs. Burnham, 156 U. S., 544—39 L. Ed., 527.

Settlement on public lands of the United States, no matter how long continued, confers no right against the government.

The land continues subject to the absolute disposing power of congress until the settler has made the required proof of settlement and improvement, and has paid the requisite purchase money.

Frisbie vs. Whitney 76 U. S., 187-197—19 L. Ed., 668.

Opinions of Attorney General, 8 Vol., 72.

Opinions of Attorney General, 10 Vol., 57.

In Frisbie vs. Whitney, ante, it was claimed that because complainant—the settler—did all that was in the power of any one to do towards perfecting his claim, he should not be held responsible for what could not be done. The court replied as in Rector vs. Ashley, 6 Wall., 142—18 L. Ed., 733, "that the rights of claimant are to be measured by the acts of congress, and not by what he may or may not be able to do; and if a sound construction of these acts shows that he acquired no vested interest in the land, then as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient." Citing

Bagnell vs. Brogedick, 13 Pet., 436.

Barney vs. Gamble, 3 How., 32.

In Hutchins vs. Low et al., 82 U. S., 77—21 Law Ed., 82, which affirms Frisbie vs. Whitney, ante, the court held that a party, by settlement upon lands of the United States, with a declared intention to obtain a title to the same under the pre-emption laws, does not thereby acquire a vested interest in the prem-

ises as to deprive congress of the power to divert it by grant to another party. In Bullard vs. Des Moines and Fort Dodge R. R. Co., 7 Sup. Ct. Rep., 1159, which was a cause arising in Iowa on the claim of the plaintiff as a settler upon the land after it had been withdrawn from settlement, the court, among other things, said: "If these lands were at the time of these settlements and pre-emptions effectually withdrawn from settlement, sale or pre-emption by the orders of the department, which we have considered, there is an end of plaintiff's title: for by that withdrawal, or reservation the lands were reserved for another purpose to which they were ultimately appropriated by the act of 1862, and and no title could be initiated or established because the land department had no right to grant it."

To same effect is Butts ex. et al. vs. N. P. Ry. Co., 7 Sup. Ct. Rep., 100-106.

The settled law in the federal courts is that, so long as an executive withdrawal of public lands continues in force the lands covered thereby are not subject to entry, and no lawful settlement on them can be acquired.

O'Connor vs. Gertgens, 89 N. W. R., 866, 869 and page 94, No. 3 Ad. Spect. U. S. S. Ct., Oct. term, 1903.

Which cites

Wolsey vs. Chapman, 101 U. S., 768—25 L. Ed., 915.

Bohall vs Dillo, 114 U. S., 49—29 L. Ed., 61.

Bullard vs. Railroad Co., 122 U. S., 167—30 L. Ed., 1123.

Spencer vs. McDougall, 159 U. S., 60—40 L. Ed., 76.

Railroad Co. vs. Smith, 177 U. S., 260—43 L. Ed., 157.

In view of the decisions above referred to it seems to us that the settlement by Sands upon the land in controversy at the

time it was made gave him no rights, legal or equitable, in the same.

It may be argued by appellee's counsel, and in fact it is suggested in the question certified, that appellee has made valuable improvements on the land, and this will be urged as a reason why the patent should be set aside. But before these were made he had full knowledge of all legislation regarding the land, and he erected these improvements upon property known by him to have been withdrawn from entry long before settled upon and never restored to entry until after his settlement, and he made them after an application to enter it as a homestead had been denied by the proper officers. Any improvements that have been placed upon this property have been so placed at the risk of appellee, well knowing, as he must, that litigation was sure to follow to determine whether he had any rights at all in the property, and in this connection we call the court's attention to the following:

Mere occupancy of the land in dispute and the making of improvements thereon by appellee, gave him under the facts of this case no vested right therein as against the United States or appellant.

Tow vs. Manley, 29 L. D., 504, and authorities cited.

In Sparks vs. Pierce, 115 U. S., 408—29 L. Ed., 429, at bottom of page it is said: "Mere occupancy of public lands and improvements thereon give no vested right therein as against the United States, and consequently not against any purchaser from them."

We now wish to call the attention of the court to the act of March 3, 1887, in view of the fact that it is an important element in interrogatory two. The bill alleges (par. 16, transcript page 15) that the secretary of the interior was about to issue, or

had issued, a patent to the land in controversy as purchasing claimant, solely under her contract of purchase under the fourth section of the act of March 3, 1887, and it is in the same connection alleged that allowing said purchasing claimant to enter and take said land by reason of, and by virtue of said contract made with said Sioux City and St. Paul Railway Company aforesaid, and under the fourth section of said act, or any other section thereof, was contrary to law and absolutely void. (Transcript, page 15.)

The Court of Appeals in the second question ask whether the appellant, Knepper, can be esteemed a purchaser in good faith of the land in controversy within the meaning of the fourth section of the said act of March 3, 1887, as against the appellee, Sands, under all the conditions supposed in the question, he being in open possession of the land and owning valuable improvements thereon when the purchase was made by Knepper.

We have already argued upon such of the facts presented in the bill as are admitted by the demurrer, that at the time Sands entered upon the land he had no right in law or equity to do so, it having years before been legally withdrawn from settlement; also that by failing to appeal from the decision of the register and receiver refusing to allow him to make entry upon this land under the homestead laws, so that the discussion at present can be narrowed to a consideration of the act of March 3, 1887, or the provisions thereof applicable to the second interrogatory. The act provides for the adjustment of land grants in aid of the construction of railroads, but is also one for the protection of good faith purchasers of lands erroneously certified, or patented, by the United States *to or for the use or benefit of* any company claiming by, through, or under, grant from the United States to aid in the construction of a railroad. We conceive it important

to note that the lands referred to are such as may have been *erroneously certified, or patented* by the United States *to or for the use or benefit* of any company, etc.

Section 4 seeks to protect persons who might have purchased, or might thereafter purchase, any of these lands described above.

Mrs. Knepper claims to be a good faith purchaser of a quarter section of land which had, as she claims, years prior to her purchase, been certified and patented by the United States to the State of Iowa for the use and benefit of such railway company, as might thereafter build a road from Sioux City, Iowa, to the south line of the State of Minnesota, or such part thereof as might be approved by the State of Iowa.

We have heretofore shown that no charge of fraud or bad faith is made against her, hence as it seems to us one of the material question is: "Did she purchase a quarter section of the lands which had been patented to or for the use of the Sioux City and St. Paul Railroad Company?" In exhibit C attached to plaintiff's bill, being the decision of the commissioner of the general land office on the appeal of Mrs. Knepper from the decision of the register and receiver (transcript of record, page 23), the commissioner states: "This tract was within the primary limits of the grant to the State of Iowa, May 12, 1864, to aid in the construction of a railroad from Sioux City to the south line of the State of Minnesota, which grant was conferred by the state upon the Sioux City and St. Paul Railroad Company; it is opposite to the constructed portion of the road, and was patented to the state for the use of said railroad, June 17, 1873."

This quotation from an exhibit of appellee contains five distinct and important facts, viz:

First. That the land in suit was within the primary limits of the grant of May 12, 1864.

Second. That the grant was made to aid in the construction of a railroad from Sioux City to the south line of the State of Minnesota.

Third. That the grant was conferred by the state upon the Sioux City and St. Paul Railroad Company.

Fourth. That the land is opposite to the constructed portion of the road, and,

Fifth. That this land was patented to the State of Iowa for the use and benefit of said railroad June 17, 1873.

These facts, together with the purchase of the land by appellant, brings the case squarely within section 4, act of March 3, 1887, and the questions, as we think, should be answered with reference to this section as contemplated by the second interrogatory, together with other important facts shown by the bill. It then appears that Mrs. Knepper was a good faith purchaser unless the mere fact that Sands was in possession of the land as a qualified homesteader, with improvements made, made her purchase one of bad faith. But it could not be in bad faith simply because of these facts of possession and improvements. There must accompany these one or more legal or equitable rights which give Sands superior claims to this land.

We ask the court to bear in mind that appellee does not make any claim to this land because of section 5 of the act of March 3, 1887. It is nowhere suggested in the bill, nor has it heretofore been urged in argument that, by reason of this section, the appellee's contention should be sustained.

The lands referred to in section 5 are clearly those "not conveyed to or for the use of such company," and, as we have shown, the quarter section in controversy was patented to the State of Iowa for the use and benefit of the Sioux City and St. Paul Railroad Company, and hence is clearly within section 4

of the act of March 3, 1887, as is conceded by the bill, and therefore, in no proper view, as we think, can section 5 be applied to the case as presented by the questions submitted.

We further urge that, by the provisions of section 1 of chapter 29, acts 54 congress, approved March 2, 1896, 29 statutes at large, p. 42, ch. 39, the appellant is protected. This court in U. S. vs. Winona & St. Peter R. Co., 165 U. S., 463—41 Law Ed., 789, has construed the act of March 3, 1887, act of February12, 1896, act of March 3, 1891, and of March 2, 1896. Appellant relies upon these acts as sustaining his right to the land in controversy, and attaches special importance to the last cited act, which, among other things, provides: "But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed," a provision recognized as of much force in U. S. vs. Winona & St. Peter R. Co., ante, on page 795—41 L. Ed.

And in U. S. vs. Southern Pac. R. Co., 184 U. S., 49—46 L. Ed., 425, this court made further reference to these laws and distinctly says on page 428, L. Ed.: "These acts were passed for the purpose of upholding the titles of parties who in good faith had purchased from railroad companies lands which, though supposed to be part of their grants, proved not to be so."

This case also settles against appellee an important claim made in the bill, viz: that there could be no good faith purchase after the passage of the act of March 3, 1887. (See transcript, page 13, par. 15, for appellee's claim, and U. S. vs. Southern Pac. R. Co., 184 U. S., 55 to 57—46 L. Ed., page 429.)

The claim of appellee that a purchase in good faith after the passage of this act was one of the main grounds for relief.

In Button vs. Drake, 14 L. D., 18, the secretary of the interior decided that when lands erroneously certified or patented

were again in the United States, they came free and clear of *all claims except those of purchasers from the railroad company.* If this be true then Sands, having no right of entry of the land while the title was outstanding in the state, and Mrs. Knepper being a good faith purchaser under the definition given in U. S. vs. Winona & St. Peter, ante, page 796 of L. E. 41, at and prior to the recovery of this land to the United States, there can be no right or equity in Sands which will justify a decision in his favor.

In addition to the facts already cited and argued as reasons why Sands had no right or equities in the land, we wish to present and argue two other points: First, that Sands had abandoned his original attempt to make a homestead filing on this land, and, second, he is concluded by the final result of the contest proceedings set forth in the bill. And now as to the first of these two points: He tendered his first homestead filing some time in 1884 (transcript, page 12, certificate, page 5), which was rejected. But from par. 16, page 14, of transcript, and from appellee's exhibit C (transcript, page 24), it appears that he abandoned that attempted filing and undertook to pursue another and distinct remedy, viz: a proceeding under the act of March 3, 1887, in which he filed application to make proof under said act, which could have been made only under section 3 thereof. But he was not content with this attempt, for it appears on same page (24) of the transcript, that on March 10, 1896, Sands again filed a homestead application for this land, alleging settlement thereon in 1884.

His conduct was certainly an abandonment of his first application for permission to file a homestead entry in 1884, and, having abandoned his application made in 1884, and presented

two thereafter—one on January 21, 1896, to make proof under act of March 3, 1887—Sands certainly cannot be heard to complain against the decision of the secretary of the interior, found on pages 27 to 28 of the transcript, when it is remembered that he not only abandoned his first application to enter the land as a homestead on being denied this privilege, but failed to appeal therefrom, and when later, as we have shown, and as his bill plainly discloses (transcript, pages 14-15, par. 16), he voluntarily appeared in the contest ordered by the commissioner of the general land office and submitted to the hearing of said cause in accordance with said order, he must be held to have abandoned all prior claims and to be bound by the result, unless he has plainly set forth in his bill, first, facts as contradistinguished from legal conclusions, showing fraud, or gross mistake in the findings of the department; or second, serious misconstruction of the law applicable to the facts found; and if either is relied upon the specific facts must be stated and the misconstruction of law must be clearly manifest.

Quimby vs. Conlon, 104 U. S., 422, 428, 441—26 L. E., 802.

In James vs. Germania Iron Co., 107 Fed., 597, on page 60, 601, Circuit Judge Sanborn says: "If he would attack the patent on the latter ground (fraud or gross mistake), and avoid the department's finding of facts, however, he must allege and prove not only that there was a mistake in the finding, but the evidence before the department from which the mistake was made, the way in which it occurred, and the fraud, if any, which induced it, before any court can enter upon the consideration of any issue of fact determined by the officers of the department at the hearing," citing:

U. S. vs. Northern Pac. R. Co., 95 Fed., 864, 870, 882.

U. S. vs. Atherton, 102 U. S., 372, 374—26 L. Ed., 213.

U. S. vs. Budd, 144 U. S., 154, 167, 168—36 L. Ed., 384.

U. S. vs. Mackintosh, 85 Fed., 333, 336.

U. S. vs. Throckmorton, 98 U. S., 61, 66, 68—25 L. Ed., 93.

Morquez vs. Frisbie, 101 U. S., 473, 476—25 L. E., 800.

Steel vs. Refining Co., 106 U. S., 172—28L. Ed., 812.

Ehrhardt vs. Hogaboom, 115 U. S., 67, 69.

Heath vs. Wallace, 138 U. S., 573, 575.

Barden vs. R. R. Co., 154 U. S., 288.

When upon the facts found, conceded or established without dispute at the hearing before the department, its officers have fallen into an error in the construction of the law applicable to the case which cause them to refuse to issue the patent to the rightful party, then the patent may be set aside. (James vs. Germania Iron Co., ante, 600) but we apprehend until the facts so "found, conceded or established," are made to appear, the court under the authorities cannot say whether an error was committed in the application of the law to such facts, and hence we claim the action of the department must be held to be final, and if final, then certainly the first question must be answered in the negative and the last one in the affirmative.

But it will be borne in mind that no allegations of fraud or gross mistake in the proceedings before the interior department are found in the bill. It is simply claimed as matter of conclusive statement:

First. That, by reason of his settlement upon the land under the conditions of federal and state legislation stated, and the making of improvements as alleged, and,

Second.—Because, as matter of law, upon the facts presented, and the purchase *after* the act of March 3, 1887, (which, it is claimed, could not be legally made because subsequent thereto), the appellee is entitled to the land.

There being no charge of fraud or bad faith in the purchase by Mrs. Knepper, and this court having, in U. S. vs. Southern Pac. R. Co., ante, decided that there could be a good faith purchase subsequent to the passage of the above named act, the case would seem to have been correctly ruled by the department. The facts as found, and the law as laid down by the secretary, unite under the numerous decisions of this court to settle the controversy against the appellee.

Finally, the possession of Sands imparted under the law no notice to Mrs. Knepper of any fact which made her a purchaser in bad faith. Much may be claimed for Sands because of his possession of the land when purchased by Mrs. Knepper. We have shown, as we think, that his possession was unlawful because the land at the time he entered upon the same, had been withdrawn from market, that he abandoned his claim of right to enter the same by attempting to make a new filing of homestead entry in 1896, and also by making application to make proof under the act of March 3, 1887, and that in meantime, between his settlement upon the land, in 1884, and his application the same year to enter the same as a homestead—and his later attempted filing of homestead entry in 1884—Mrs Knepper Sands, on June 21, 1887, purchased the same in good faith, and hence acquired superior rights and equities in and to the land, and we contend that, having a right to purchase, and purchasing in good faith, she cannot be relegated to an inferior position simply because Sands was in possession and had improved the land. But what virtue ex-

isted in his favor under the law of notice to others dealing with the land while he was in possession? Jones, in his Law of Real Property, 2d vol., sec. 1565, says: "If the person in possession has no title or right of possession whatever, but is a mere intruder, his possession is not notice and does not put a purchaser on inquiry," citing:

Western Mining & Mfg. Co. vs. Coal Co., 8 W. Va., 406.

Writ vs. Wood, 23 Pa. St., 120.

Wade on Notice, 2d Ed., sec. 294, says: "It is also essential that the possession, which is to operate as notice of title shall be contemporaneous with the existence of the right and title it is relied upon to establish and prior to the subsequent purchase. Therefore it was held in an action of ejectment, that although the defendant was in actual, open, undisputable and exclusive possession of the premises in question, holding under a quit claim deed at the time the same was conveyed to the plaintiff, such possession was only notice of such title or interest as he then had."

And in U. S. vs. Winona & St. Peter R. Co., 165 U. S., 463—41 L. Ed., 789, beginning at bottom of page 796, L. Ed., the court says: "It matters not what constructive notice may be chargeable to such a purchase (under sec. 4, act March 3, 1887) if in actual ignorance of any defect in the railroad company's title, and in reliance upon the action of the government on the apparent transfer of title by certificate or patent, he has made an honest purchase of the lands. The plain intent of this section is to secure him the lands, and to reinforce his defective title by a direct patent from the United States and leave the government a simple claim for money against the railroad company."

But suppose Mrs. Knepper was, by reason of Sands' possession, put upon inquiry, what would she have learned? On go-

ing to the land office at Des Moines she would have learned that this land had long since been withdrawn from entry and market; that while it was so withdrawn Sands had, in 1884, proffered his homestead application and fees at this office; that the application had been denied and no appeal taken from said decision, and hence she would have learned that Sands had no right, title or interest, legal or equitable, in this land. So we insist Mrs. Knepper is not prejudiced by reason of the possession of Sands when she made her purchase.

We give notice of oral argument at the hearing of the interrogatories.

I. S. STRUBLE,
Attorney for Appellant, Elmira Knepper.

IN THE

PREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

FILED

APR 13 1908

CLERK

No. 222

ELMIRA KATZENSTEIN, Appellant

vs.

JOHN A. SANDS, Appellee

ITED ON QUESTIONS ASKED AND SUBMITTED TO THE PREME COURT OF THE UNITED STATES BY AND FROM HE CIRCUIT COURT OF APPEALS OF THE EIGHTH JU- CIAL CIRCUIT, SITTING IN ST. LOUIS, AND THEY ARE FILED ON APPEAL FROM THE CIRCUIT COURT OF THE NITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

RIEF AND ARGUMENT OF APPELLEE.

JOHN H. KING, Fisher, S. D.

el for Appellee, who is the Plaintiff in the original suit.

B. DAVIS, of Sioux City, Iowa,

Associate Counsel.

21602

IN THE

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

EQUITY.

No. 233

ELMIRA KNEPPER, Appellant

vs.

JOHN A. SANDS, Appellee

CERTIFIED ON QUESTIONS ASKED AND SUBMITTED TO THE SUPREME COURT OF THE UNITED STATES BY AND FROM THE CIRCUIT COURT OF APPEALS OF THE EIGHTH JUDICIAL CIRCUIT, SITTING IN ST. LOUIS, AND THEY ARE TRIED ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

BRIEF AND ARGUMENT FOR APPELLEE.

After a full hearing on the trial of the case and oral argument made to the Court and printed briefs on both sides submitted, the Circuit Court of Appeals united in asking the following questions of the Supreme Court of the United States and duly certified the same to-wit:

And the said circuit court of appeals for the eighth circuit further certifies that the following questions of law, among others, arise and are presented by the assignment of errors in this case; that the decision thereof is indespensable to a correct decision of the cause; and that to that end it desires the instruction of the Supreme Court upon the following questions and propositions of law, to-wit:

First. In view of the provisions of the act of Congress of May 12, 1864, by virtue of which the land in controversy was granted to the State of Iowa, did the action which was subsequently taken in manner and form aforesid, by the governor and legislature of State of Iowa, operate as a final adjustment of the grant so far as the Sioux City & St. Paul Railroad Company was concerned and by virtue of its being so adjusted, exempt or except the grant in question from the provisions of the adjustment act of March 3, 1887?

Second. In view of the terms of the granting act of May 12, 1864, and the action subsequently taken in manner and form aforesaid by the State of Iowa, acting through it governor and legislature, can Elmira Knepper, the appellant, be esteemed a purchaser in good faith or a *bona fide* purchaser of the land in controversy, within the meaning of the fourth section of the adjustment act of March 3, 1887, as against John A. Sands, the appellee, who was in open possession of the land in controversy and had erected valuable improvements thereon in manner and form aforesaid when said purchase was made?

In witness whereof the undersigned judges, holding the said United States Circuit Court of Appeals for the eighth Circuit, have hereunto set their hands this 25th day of February, A. D., 1903, at St. Louis, Missouri, and ordered that

the foregoing certificate be filed in said United States circuit court of appeals and by the clerk of said court duly forwarded to the Supreme Court of the United States.

HENRY C. CALDWELL,
WALTER H. SANBORN,
AMOS M. THAYER,
Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

Elmira Knepper, appellant, claims this land in question by reason of the purchase thereof from the Sioux City and St. Paul Railroad Co., under a contract made in 1887 and after the passage of the act of March 3rd, 1887 under and by virtue of the fourth section of said act.

The first section of this act provides that the secretary of the interior shall proceed to adjust the unadjusted land grants of the different railroad companies, and where he finds lands have been sold or settled upon the rights of the different classes of settlers or purchasers are preserved—are provided therein by paying the government price to the United States and receiving a confirmatory patent for said land.

The fourth section of said act is where patents to the lands have been issued to the railroad company or for their use and benefit, erroneously or otherwise, the purchasers who in good faith have purchased, shall have the right to pay to the United States the government price for said land and upon proper proof of the same shall receive a confirmatory patent therefor.

Section five is where they have purchased land in good faith to which the railroad company had no patent, but which land was situated or located opposite to or contiguous

with the constructed portion of the road. But with the further proviso that no purchase made after 1882 of the contiguous land (where no patent was issued to the company) should be valid. These lands were located opposite to the constructed portion of the road but being purchased long after the railroad company had received all the land they had earned and had not received the patent, therefore and long after 1882 they could not be claimed under this section, so if claimed at all must be claimed under section four.

In this action John A. Sands is the homestead claimant, settling on said land after the state had conveyed the same back to the United States and before the pretended purchase was made by appellant of the railroad company, basing his claim on the continuous settlement, improvement and cultivation, fully complying with the homestead laws of the United States, notwithstanding the interior department awarded a confirmatory patent to the appellee under the pretended purchase of appellant from the railroad company as stated, and he petitions the court in equity to set aside this patent, setting up all the facts and alleging that the secretary of the interior erred in his construction of the law, and that under the law the secretary of the interior had no right to issue the confirmatory patent to the purchaser and should have under the law awarded the patent to plaintiff and appellant and asking that the titles be decreed in him. To this petition appellant demurred, the Circuit Court overruled the demurrer and he appealed to the Court of Appeals and they ask of this court the answer to certain questions heretofore quoted.

Our first contention is that the act of March 3rd, 1887 does not apply to these lands; because the first section of the act

of March 3, 1887; provides that the secretary of the interior shall proceed to adjust the unadjusted land grants in the United States and then the provisions following apply to the condition of the affairs which he finds in these unadjusted land grants, and this land grant having been adjusted long prior to the passage of the act, was therefore not applicable thereto.

Second.—The claim of the appellant is made under section four of the act of March 3, 1887, on what is called patented lands to the railroad company and these lands were never patented to the railroad company and no condition existed to bring them within the provisions of section four of said act.

Third.—Our principal and main contention is that, under the granting act of May 12, 1864, that it fully conferred upon the State of Iowa through its legislature and officers, the full authority, the absolute right and it became its duty in this case to adjust the land grant to this company that the act gave to the State of Iowa, the absolute control of said lands, the right of granting to the railroad company the right of adjustment, the right and authority of forfeiture, right of resumption and the right to re-grant the land to another railroad company in case of the failure of the first to perform within the ten years' limit, and the right to use the land in any manner consistent with the granting act of congress so as to secure the building of the road within five years more.

And in this connection we allege that the grant to the State of Iowa to secure the building of this road and the McGregor and Missouri River railroad company west to an intersection therewith, all in the same grant, *was unlike any other grant* ever made by congress to any other railroad company

or any other state, in this: *That in all the other grants* upon the failure of the railroad company to build the road in the time limit fixed by congress, that the lands reverted to the United States.

WHEREAS: In this case, the time limit fixed by the United States for the grantee company to build the road was ten years, and when that time expired, the land did not revert to the *United States but reverted directly to the State of Iowa;* and congress gave to the state this right of resumption which carried with it the right of adjustment and the authority to use the land with any other company or in any manner the state saw fit, to secure the building of the road. And in this connection our contention is, that the State of Iowa, by and through its governor and proper officers and by and through the legislature of the state, fully adjusted this grant to this company and conveyed all of the lands that the railroad company had earned to it and emphatically refused to convey any more lands to the said company, although the company demanded the same and the refusal of the state by the governor was publicly proclaimed by and through the land department of the State of Iowa, by and through the message of the governor to the said legislature and that the said legislature declared a forfeiture of said lands fully resumed the same and so far as the Sioux City and St. Paul Railway company was concerned conveyed them back by an act of the legislature to the United States, all done many years prior to the passage of the Act of March 3, 1887 and many years prior to the pretended contract of sale made by the railroad company to the appellant for this land and after the passage of the Forfeiture and Resumption Act of the legislature of Iowa which also declared in said act to be for the

purpose of enabling settlers to go upon said land and claim the same under the homestead law and after this the appellee settled on said land and said settlement and occupation was continuous, open and notorious and was prior to the purchase or pretended purchase of this land by the appellant of the railroad company.

Our contention is that this action of the State of Iowa under the authority given them by Congress in the granting act of May 12, 1864, concluded the railroad company and the parties purchasing from them and all others, that the pretended contract of sale made after all this had been done, was and is absolutely void and not only without authority of law, but contrary to law.

And we contend that even in the absence of a homestead claimant for said land, that the Secretary of the Interior of the United States would not only be justified in refusing a confirmatory patent therein to the appellee, but that the executive department of the government *has no authority of law* by which they can issue this patent to the claimant, claiming to purchase of the railroad company for this or any of these lands under any provision of the act of March 3, 1887, or any other provision of law. That there is no law whatever justifying the claim of the appellee and with the permission of the Court, we will present the third contention first.

Third. We think a brief review of the granting act of 1864 and the act of March 3, 1887, together with the action of the duly constituted authorities of the State of Iowa and the legislature thereof in relation to these lands will fully satisfy the court of the correctness of our contention.

The McGregor Western Railway Co. was named in the granting act of 1864 but the Sioux City Railroad Co. was not

named, but the State named it in the act of the legislature in granting the land to it and the following is the provision in relation to the reversion in the act of 1864 after providing that the lands granted shall be subject to the disposal of the legislature of Iowa for the purposes aforesaid and no other.

Then following: "That if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall *revert to the state of Iowa* for the purpose of securing the completion of the said road within such time not to exceed five years and upon such terms as the state shall determine and provided further that said lands shall not in any manner be disposed of or encumbered except as the same was patented under the provision of this act."

Then comes the provision that should the State fail to complete said road within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States.

Now under this authority given to the State of Iowa by this act of Congress, the State through its legislature exercised their right and authority after the expiration of ten years wherein the McGregor Western Railroad Co., afterwards McGregor and Missouri River Railroad Co., had failed to complete their road within the time limit and the time limit of ten years had expired, and the road had only been built to Algona, whereas it should have been built to its intersection in O'Brien Co., at or near Sheldon, Iowa, the State by its governor and land department adjusted the grant, prepared a list of the lands unearned and unpatented to the railroad company declared a forfeiture of the lands and rights of the company and re-granted the same to another

railroad company, to-wit: The Chicago, Milwaukee & St. Paul Co., who built the road and secured the lands from the State within the five years limit provided for in the act of Congress.

For this action of the Iowa legislature, see chapter 21, page 18 of the laws of Iowa for 1878, 12th General Assembly, wherein it was recited:

"That as the McGregor Western Railroad Company, known as the McGregor & Missouri River Railroad Company, had failed to comply with the provisions of the act of the 12th General Assembly, etc., therefore.

"Be it enacted. Section 1. That all lands or rights to lands heretofore granted the McGregor Railroad Company, be and are absolutely and entirely resumed to the state of Iowa."

Then section 2 granted all these lands to the Chicago, Milwaukee & St. Paul Railroad Company on the conditions therein named, to-wit: The provisions of the granting act of 1864.

Now, no one has ever questioned the authority of the State, the legislature thereof, to adjust the amount of lands that the McGregor Railroad Company was to receive and to declare the forfeiture of the balance and to resume the lands and regrant the same. Not only has this title never been questioned, but has directly been recognized and approved by the supreme court of the United States.

I say, however, that this title has never been questioned; but I can hardly say that, because it was questioned by homestead claimants, and while we have not found that any action has been taken by the supreme court of the United States, yet the title was duly confirmed in a number of cases tried in O'Brien county, and the supreme court of the state

of Iowa found that the Chicago, Milwaukee & St. Paul Railroad Company had a good title to this land.

Now, the only title it could have received was by and through the action of the State through its proper officers adjusting the grant, of the Iowa legislature declaring the forfeiture, resuming the land, and regranting it to another railroad company, all done by and through the operations of the officers of the state and the action of the legislature of the state of Iowa. It was the only source by which the Milwaukee & St. Paul Railway Company ever had, or ever could have received a single acre of this land. In fact, the court held this title to be good. After the United States government and held this title to be good, and after the United States and the state of Iowa had parted with thousands of acres of land in this manner, had built up a precedent, and the law had been fully recognized, now certain parties come to this court and question the authority of the state, on the action of the state and the validity of the state in a similar case under the same grant but to the Sioux City company. There is no basis upon which this claim by the defendants can be made to even live, let alone be executed and the title confirmed in any manner but by ignoring, setting aside and declaring inoperative without authority of law the action the state in adjusting the grant, of the Iowa legislature in declaring the Sioux City & St. Paul Railway Company's grant forfeited, resuming the same, and reconveying it to the United States. You must violate and ignore the granting Act of 1864 and the action of the legislature and only constituted authority of the state of Iowa in order to sustain the contentions of the appellant.

While it is true this land was patented to the state of Iowa in 1873, the patent read "for the use and benefit of

the Sioux City & St. Paul Railway Company," but the state holding the title from the United States could make no possible difference. The state was charged with the responsibility of not giving it to the railroad company only as it had earned it.

Now it is not contended by counsel that a patent was ever issued by the State of Iowa to the railroad company for any of these lands in question but they undertook to say that by reason of the erroneous issuing of the patent to the State of Iowa which is conceded to be erroneous and was issued contrary to law and although never conveyed by the State of Iowa to said railroad company but the State had absolutely refused to convey the same. Yet by reason of the formal use of words in that erroneous patent which I presume was a form made to apply on other grants where the reversion was direct to the United States, they used the term to the State of Iowa for the use and benefit of the Sioux City and St. Paul Railroad Company under the granting act of 1864.

It is barely possible that a court of equity might hold that if a purchase had been made while the state held the title which used these words, for the use and benefit of the Sioux City Co. before the State had openly, notoriously and publicly refused the railroad company to patent the same to them giving the reason of their refusal, and before the open and notorious fact that the railroad company had failed to earn the lands and were not entitled to them and would not be allowed to receive them and before the Legislature of the State of Iowa had openly and notoriously passed and published its statute declaring the forfeiture and resumption of these lands to the state, that a court of equi y might have considered the question. I do not think, however, they could ever

concede it by reason of the direct injuction in the granting act which absolutely prohibited the sale or incumbrance of any of these lands until they had been earned and patented to the company so that I think the court would have found that the purchaser would have been bound to have taken notice of the fact of the recorded conveyances of the State of Iowa of the number of acres of land received by the railroad company to be the full sum to which it was entitled and which they had earned, as the granting act specifically stated the number of acres they should receive for each ten miles constructed. So that I do not believe even then there would have been any equity whatever in the case or that any wise or learned court would have so found.

If all of these lands had been given to the state of Iowa and conveyed by the United States to the state of Iowa immediately upon the passage of this grant, the law would not have been a particle different, nor the rights of the parties changed in any respect, nor in any manner enlarged than it would have been if it had never been patented to the state. No man can claim under the law that he was in any manner misled by it, because the act absolutely provided that the railroad company should never receive it until they had earned it and in this case the state authorities asserted they never would convey it. No man can claim under the law that he was in any manner misled by it, because the act provided that the railroad company should never receive it from the state, that the governor should never give it nor certify it until the railroad company was entitled to it; it provided that the state legislature had to dispose of the land, and at the time and during the fifteen years of the life of the grant, the state was the only authority under the act of congress that had any right to dispose of the land and the

state was the only authority that had right to adjust the grant, to declare a forfeiture and resume the grant and regrant the same to another company if it saw fit, as it did with the McGregor company, and it also took definite and direct action as to this land and took it out of the operation of the grant or the subsequent act of March 3, 1887.

Whatever may have been the practice or the custom of the officers of the United States land department, as to writing deeds or patents, the authority absolutely rested with the state to say whether the railroad company had built the road, and whether they were entitled to the land.

The United States transferred that authority to the state, and while it may not have been intended by the members of congress or the law itself to prohibit the government of the United States from exercising some supervisory power to prevent the squandering of the lands unjustly, and while it may not have been intended that the government of the United States should in fact convey this land to the state until these railroads had been built and the fact certified by the governor, yet the state had its duty to perform, its decision to make. The mistake of the United States in deeding or conveying the land to the state of Iowa, lands which the railroad company had not earned, was not a mistake of the state, and it could not under the law inure to the benefit of the railroads, nor any one purchasing from them either directly or indirectly.

There is a vast deal of difference between the authority imposed in this grant to secure the building of this road and the other road named in the grant, McGregor Western Railway Company, and that which gave to the state of Iowa the grants for the Burlington and Rock Island grants, that

gave to the state of Michigan the Sault Saint Marie, and to Wisconsin and Minnesota their various grants.

In none of these cases, nor in any other that ever existed, was the right to regrant to another railroad company to secure the building of the road designated after the grant was forfeited by the first.

I would therefore ask the Court to notice carefully the difference in the reading of these other grants. My contention is that this grant to the state of Iowa to secure the building of these roads, placed the state in the same position for the time being, as the United States, as to these other grants with just as full power as the United States had in these other cases, and that this action of the Iowa legislature had as full force and effect as could an act of congress if it had not designated this power to the state of Iowa, and this deed to the state never had been made, and that it was, so far as the law of the case was concerned, the original grantor, and that it mattered not what the United States might have done in error or otherwise as to premature deeding to the state, the law was so framed and must be so construed that this action of the state legislature must control this matter so far as this case is concerned, was conclusive and binding on all parties, as long as that action of the state legislature was within the limits of the authority granted it. That the words in the patent to the state of Iowa "For the use and benefit of the Sioux City & St. Paul Railway Co.," was without any authority of law, and void except possibly a description designation. Not only the railroad companies, but all the world was bound to take notice of the law in relation thereto and the subsequent action of the state authorities and the legislation thereof.

Suppose the railroad had been constructed with wooden rails on practically no grading so as to be useless; the state would have been perfectly justified in refusing the conveyance.

There must be read into this patent the statutes of the United States which say, and must be construed to say:

And provided further that the state of Iowa has full authority to declare the forfeiture, to adjust this grant, resume the land and grant the land to another company, or comply with this grant in any manner it may see fit to secure the building and completion of said road, if the original grantee fails in ten years to construct as provided therein. That is what the patent of 1873 in law says; that is the way in law and in equity this patent reads; any other construction is an unjust construction; any other construction is a harsh construction; any other construction changes the meaning of the English language, and changes the law of this case, and would be an injustice to the grant; any other construction of the law would be contrary to public policy, because it would cheat the government of the United States, and would cheat the state of Iowa and the people thereof, and fail to secure the public improvement intended, and defeat the object of the grant, and deprive settlers on the public domain of the use thereof, and give an opportunity for speculation not intended.

The law is clear and demands but one meaning; there is no reason in the world why it should be construed in any other way than this way. As to construction of statutes see

Sutherland on Statutory Construction, pp. 235 and 237.
Vol. 23, Am. Eng. Enc. of Law, pp. 319, 320 and 326.

It is possible that in the authority given in the other acts of congress wherein these lands were made subject to dis-

posal of the legislature, and in case of failure to revert to the United States, but no reversion to the state, that some declaration of resumption and forfeiture may have been allowable and proper for the information of the United States from some authorized source, that the United States by its proper officers might proceed to attend to the matter, as the state itself was only interested in securing the completion of its internal improvements and benefits derived therefrom, and executing the trust conferred, and although it is possible that their declaratton of forfeiture might not have been good and that the resumption might not have been complete as to these other grants without the affirmative action of the United States, and the reversion never have taken place until the United States acted. But in this case the state of Iowa stood as the actual grantor and was the interested party. It was in fact the grantor to the railroad company, and the beneficiary under the grant to the state, might be one company for a part of the time and another company some other time. The land might have been disposed of in some other way, just so that it was used for the securing of the building of this road, and under that grant undoubtedly the state might have built the railroad itself, but this was not the case in any other grants ever made by any other states, or in favor of any other companies.

There is in this case not even the contention that the state of Iowa was wrong in its conclusion of the law, or finding of the fact. The supreme court of the United States in its decision, October, 1895, settled all that. If the railroad company had had any equity whatever in this matter the court would have give it to them, but they had none, and there never was a minute's time that these lands were ever erroneously or otherwise conveyed to or set aside to the Sioux

City & St. Paul Ry. Co., nor for their use and benefit, so that any intelligent, honest man could have been misled.

Further, that these facts which we plead are not demurrable, and that to concede them to be true concedes that the defendants have no case.

This granting act of 1864 provided that the lands should only be given the railroad company as they earned them, and in the latter part of section 4 the following language is used:

"And provided further, that said lands shall not be in any manner disposed of or incumbered, except as the same are patented under the provisions of this act."

Now, to contend that the patenting to the state of Iowa of these lands under the provisions of this act, is a patenting to the company within section 4, is simply a misconstruction of the language. It is out of harmony with the equity and law of the case. It is a construction that it is not warranted by law. The provisions are that they should not be patented to the railroad company until they earned the same; the patenting to the state was not the patenting to the railroad company; the state had to certify to and patent it then to the company and they not only never did it but emphatically refused to do it.

Now, this sale of said lands by the railroad company was a sale which was prohibited until the lands were patented to the railroad company, which could not be done until they had earned them and they never earned them, and they never were patented to them erroneously or otherwise. The Court says the grounds of the forfeiture of the contract are immaterial if the subject of the contract was not to be contracted for

Vol. 3. Am. Eng. Enc. of Law, 872: "A contract founded

upon the transaction prohibited by the statute cannot be maintained."

A valid existing contract must be in existence at the time or this right to land cannot be maintained. See cases cited, p. 872.

Now, it is not whether a mistake was made, not whether the railroad company sold lands to which they were not entitled, but in this case there was a positive prohibition against the sale. All contracts made in violation of the expressed statutory provisions are inoperative and void.

Penn vs. Bourman, 102 Ill., pp. 523 to 528.

Parties ought to know what these laws are, for the law will not lend its support to a claim founded on its own violation.

Copel vs. Hall, Wal., 542.

Craig vs. Missouri, 4th Peters, 410.

Armstrong vs. Toler, 11th Wheaton,258.

Doland vs. Carr, 125th U. S., 610 to 630.

Bank vs. Merrick, 14th Mass., 322.

Hunt vs. Knickerbocker, 5th John., N. Y. Rep., 327.

Swan et al. vs. Miller, 1st S. Rep., 65.

In this case the Court says: "That it is the elementary law that purchasers must take notice of the recital in the deed and of the law constituting their chain of title."

This grant was to be applied exclusively to the building of the railroad, and the land to be used for any other purpose was expressly prohibited. Purchasers and all parties were bound to take notice.

See Wade on Notices, Secs.45 and 47.

4th Hare, p. 147.

7th Hare, p. 191.

18th Beaver, p. 85.

30th Beaver, p. 465.

Stewart vs. Matheny, 66th Miss., 21.

Jelison vs. Halloran, 44th Minn., p. 129.

Also see Wade on Notices, Secs. 11 and 12.

Simmons et al. vs. Dorand, 12th U. S.; Supreme Court Rep., 439.

Wherein discussing bona fide purchases, Fuller, chief justice, quotes from Burwell's Administrator vs. Fauber, 21 Gratt, Vir. Rep., pp. 446 to 463.

Wherein it says purchasers are bound not only by actual notice, but have no right to shut their eyes and ears to the inlet of information. See cases cited.

The granting act and the acts of the Iowa legislature would give notice to the world of the condition of the title. I have no question about this whatever; the court and everybody else must take notice of it.

The laws of the state are in force without notice, and all are charged with notice of their existence and rights arising thereunder.

Vol. 16, Am. Eng. Enc., 807.

Now, returning to the original proposition and connected with the rights of the state and duties under the granting act, and touching upon the question of

FORFEITURE, ADJUSTMENT AND RESUMPTION,

I have presented to the court the precedent cited of the acts of the state legislature, relative to the adjustment, forfeiture and resumption of the grant to the McGregor road, and the regrant to the Chicago, Milwaukee & St. Paul Railroad Company. The governor in his message to the legislature of 1882 recited his refusal to comply with the request of Sioux City

& St. Paul Railway Company to convey the land to them, and his full reason why, reciting the failure of the Sioux City & St. Paul Railroad Company to build the roads in accordance with the grant, and recomending action thereon which the legislature took. Read act 18 general assembly.

Now, for the purpose of this argument, it becomes entirely immaterial whether the state ever gave it back to the United States, or whether it ever gave it to any other railroad company. The only thing we are concerned in is, did it declare a forteiture of this land? Did the state adjust the grant? Did it resume the unearned lands?

If it did this, the further act of reconveyance back to the United States is entirely an immaterial matter. Now the declaration of the governor in his official capacity to the legislature of the state in his regular biennial message must be accepted as a proper statement of facts, as he was the authorized executive head of the government of Iowa. His message is set out, and we file herewith a book containing his message, which is found in the first part of the book, Governor Sherman's message being in the latter part, and all printed by authority of law.

The legislature enacted and passed chapter 107 plead and heretofore referred to. As we have said that the state of Iowa through this land department, which was then in charge of the secretary of the state, J. A. T. Hull, afterward lieutenant governor and now a member of congress, wherein he made his report to the top of page 89 the exact status of these lands in question. This same list had been prepared as the records show many years before published in the report of the land department, but we use this list for convenence.

The second column gives the number of acres certified to the railroad company by the state, and the third column gives the number of acres withheld from the railroad company and the counties in which it is situated, which is 85,457 and 41-100 acres. This was and has ever since remained the adjustment of the Sioux City & St. Paul land grant under the act of March 12, 1864, and has never been and never will be changed.

It will be remembered and noticed that in this 85,000 and odd acres that the Chicago, Milwaukee & St. Paul Railway Company had claimed as their lands, by reason of its completed construction, the whole of the grant in the overlapping limits which the Sioux City & St. Paul disputed, and which the Supreme Court of the United States decreed that each company should have a moiety and which took away from this 85,000 acres a little over 37,000 acres; I have not the exact figures before me. Then there were the 26,000 acres certified back to the government of the United States in Plymouth and Woodbury counties and the balance of the lands, about 21,000 acres, in litigation, but no more lands were ever conveyed to the railroad company, nor any other lands than those enumerated in this adjusted and withheld list. No other list has ever existed to my knowledge or information that I have ever been able to find, except this list.

This contention of the Chicago M & St. Paul Railroad Company that they were entitled to these lands if the Sioux City company was not, was the cause of the second clause of the act of the Iowa legislature of 1884 requesting the governor to withhold certificate to the lands in O'Brien and Dickenson counties.

The state of Iowa had the books, the papers, the number

of the lands it had given to the railroad company, and nobody else had them or could get them, except through the state of Iowa. It is a reasonable and proper construction to put upon the law. The railroad company brought suit against the governor to compel him to convey, and then withdrew the suit. See page 52 of the report of the secretary of state, land department of 1885, which is filed herewith, and the governor says that in 1878 the company requested him to certify and patent the remainder of these lands, amounting between 85,000 or 90,000 acres of land, and he declined to do so and requested the legislature to take proper action thereon.

It need not therefore matter that a secretary of the interior or that a commissioner of the general land office, or that any other person having been used to other grants of land, to other states for other railroads different from this, that the United States itself was concerned in, and had to make the adjustment and the state was merely acting as a trustee without authority, only to do certain things which were done, and not to resume and adjust and forfeit in case it was not done, as in this case, should speak of this grant as unadjusted and inadvertently say to the commissioner of the general land office to adjust this grant, etc., but the adjustment had in fact all been made. It is possible the government had not been informed of it, but it had been made. Now all this had been done prior to the passage of the act of March 3, 1887, and therefore does not apply to these lands.

Therefore my contention then is, in connection with the conclusion of the other proposition that by reason of the first and second sections of the act of March 3, 1887, wherein it

says that the secretary of the interior is authorized and directed to adjust certain land grants so far unadjusted, and that if it shall appear upon the completion of such adjustment that so and so has been done; that if at the time of the passage of the act the adjustment had been made and completed, that this act did not apply to land grants already adjusted, and that this was one of them.

Now, while these letters and papers may show that these officers were in some doubt about the construction of the law, yet nowhere is there a doubt cast about the fact of the number of sections of 10 miles each of road that the company had constructed, the amount of land they had received and the amount of land withheld, nor has there been any question made that the list of withheld lands, published by the secretary of the state before the governor, at the time of his annual message in 1882, and at the time of the passage of the act or the legislature in 1882 adjusting the land, was the only list and has ever remained the only adjusted list, and that that list of withheld lands was the list that the supreme court decided October, 1895, that the railroad company had no title to nor interest in, and altogether was a complete adjustment of the grant and has ever since so remained and this adjustment was made in 1878.

"HAVE BEEN SOLD"

Now, then, there is one other proposition in connection with the construction of this act of March 3, 1887, whether it can apply to these lands in question notwithstanding these other conclusive grounds which I have recited. It is a question that I will not argue long, but I want to be well understood in relation thereto, and that is the words "have been sold" in section 4 of the act of March 3, 1887.

It seems to me that while a close construction would bar sales made after the passage of the act, yet a very liberal construction would not extend them beyond the adjustment of the grant.

Now, "have been" is in the past tense; "have been" in the future, notwithstanding the interior department commenced in an ex parte case in Wisconsin, where there was a transfer from one railroad company to another of its rights and interests, after the passages of the act before an adjustment of it and it sort of took this land by succession, where the case was not argued nor presented, the interior department inadvertently established a precedent, and since then has held that contracts made after the passage of the law were good. The learned assistant attorney general, Mr. Vandeventer, in commenting upon it in the trial of one of these cases before the interior department, said that if he had had the original construction of this language he might have construed it differently, and intimated that he would, but that a precedent had been established for him.

Now if these sales could have been confirmed and the land given to the purchaser on contracts made after the passage of this act and after the adjustment then let us reason for a moment what kind of a condition we would be in.

If this position is taken to be true, then this act, instead of correcting the evil complained of, instead of its preventing the squandering of the public domain, instead of its preventing these lands from going into the hands of speculators, and instead of its preserving the public domain according to the long, well established line of public policies in the United States for actual settlers; it means to give it to the speculator, it means to put in the power of these railroad

companies and any purchasers they might find the power to sell nearly all if not all of the lands. It was intended by the act of March 3, 1887 to preserve the lands and not squander them.

To construe this act of March 3, 1887, in such a way as to permit sales after the passage of this act and after the adjustment of the lands would be to nullify it. On this subject see,

Farnsworth vs. Railroad Company, 93 U. S. Sup. Court, p. 56.

Farmers' Loan & Trust Company vs. Railroad Company 39 Fed. R., p. 151, and cases cited.

Schulenburg vs. Harriman, 21 Wall., p. 44.

Lau Ou Ben vs. United States, 144 U. S., p. 4750.

Sutherland on Stat. Const. Supra.

This court has never decided the railroad company could sell these lands after an adjustment had been made; they have indicated they might be sold after the passage before an adjustment had been made.

As bearing a little upon the questions involved in this case, I will call the attention of the court to the case of the Sioux City & St. Paul Railway Company vs. The County of Osceola, 43 Ia. R., pp. 321 and 322.

Also cases of

Bowen & Sleeper vs. Bisland, 41 N. W. R., p. 161.

Railroad vs. Countryman, 43 Iowa, p. 181.

Cases in 139 U. S. Sup. Court, p. 377.

Swan vs. Miller, 1st S. R., pp. 65 to 69.

Second Pomeroy's Edition on Equity Jurisprudence, Sec. 745.

Johnson vs. Townsley, 13 Woll., p. 732.

Defanback vs. Hawke, 115 U. S., p. 302.
Clarke vs. Des Moines, 17th Ia., p. 199.
159 U. S. Sup. Court, p. 371.

TRESPASS.

I do not deem it necessary to talk about the question of trespass. Under the conditions of this case I cannot see that there is anything in this question.

Even if the case of Superior Ship Canal Co. et. al. vs. Cunningham in the 155th Supreme Court Reports, page 103, especially page 113, had not been decided, it has been a long standing rule of the interior department that in the case of claimants for public lands, while they acquired no rights as against the United States, yet as between other claimants the time of their settlements in good faith would be taken into consideration, and their prior rights preserved, as against individuals; that the United States alone could decide this question, and they have decided it, and recognized it in thirty-five of these cases by granting patents for settlement, against subsequent purchasers of the railroads. In fact, the United States government has entirely ignored this question of trespass; there is nothing in it.

There are a great many other questions in this case; my associate counsel will fully present them. The prominent features may be summed up:

First, that this land grant was adjusted by due operations of law, and the acts of the officers and the legislature of the state of Iowa, long before the passage of this act of March 3, 1887, and under section 1, only unadjusted grants are affected by this act, and therefore this act does not apply.

Second, that the contracts are void, being contrary to the granting act, because the railroad company were prohibited

from selling the lands until they had earned them and they were patented to them, and they never were patented to them and the 4th section of the act of March 3, does not apply to this land, neither had they ever earned them.

Third, that the action of the governor and officers of the state of Iowa in conveying to the railroad company all the lands they had earned and to which they were entitled for the road constructed and publically and officially refusing to convey any more lands and assign their reason therefore that the road was not entitled to any more making a final adjustment of the grant so far as the Sioux City company was concerned by the lists published and proclaimed of the unearned and unpatented lands, and the final action of the Iowa legislature in declaring the lands forfeited and fully resumed and the subsequent act of the legislature in conveying them back to the United States, all of which the state had the right to do and which was its duty to do, concluded the railroad company and those who might subsequently purchrse of them after all of this was done and all would be bound thereby and those claiming by virtue of said contract to sell would have no rights and that the land in time became public and unappropriated land and finally subject to homestead entry.

And the plaintiff and appellee herein should maintain his suit under his petition filed and the patent issued to the appellant contrary to law be set aside and the title decreed in John A. Sands, the plaintiff and appellee.

JOHN H. KING,
Counsel for Plaintiff and Appellee,
Huron, South Dakota.

M. B. DAVIS,
Associate Counsel,
Sioux City, Iowa.

21617

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 233.

ELMIRA KNEPPER, APPELLANT,

vs.

JOHN A. SANDS, APPELLEE.

On a Certificate of Questions Propounded by the Court of Appeals of the Eighth Circuit of the United States.

I. S. STRUBLE, *Attorney for Appellant.*
KING & STEARNS, *Attorneys for Appellee.*
M. B. DAVIS, *of Counsel for Appellee.*

APPELLEE'S BRIEF AND ARGUMENT.

On the 18th day of March, 1901, complainant filed his bill in equity in the United States Circuit Court, in and for the northern district of Iowa, against Elmira Knepper, respondent, in which he alleges that for many years after the adjustment, resumption and forfeiture of the grant for May 12, 1864, to the Sioux City and St. Paul Railroad Company,

by an act of the Iowa legislature and the offices of the state and the relinquishment of the land in question by the legisture of the state of Iowa to the general government, the land remained open, unoccupied and unappropriated public land, and that more than three years after this resumption act, and more than one year after the relinquishment act, and in 1884, complainant herein settled upon said land with the open and declared purpose of taking said land as a homestead, to-wit: the northwest quarter of section 9, township 49, range 42, O'Brien county, Iowa, and did erect thereon a house, and break and cultivate and fence said land, putting improvements thereon of the value of $1,750, and that he has ever since resided thereon, claiming said land as his home, under the homestead laws of the United States.

That on the 18th day of November, 1885, the secretary of the interior issued a proclamation or notice and instructions relating to the entry of said land, among other lands; that on March 10, 1896, complainant appeared at the local land office at Des Moines, Iowa, and tendered his homestead filing for said land, alleging his residence and cultivation of said land, and legal qualifications to make said entry, all in full compliance with law, and tendered legal and proper fees and homestead filing therefor, which filing and tender of fees the land office held in abeyance pending a trial and examination of the rights of all parties concerned, including the claim of respondent, Elmira Knepper, to purchase said land under and by virtue of an alleged contract of sale made with the Sioux City and St. Paul Railroad Company to Elmira Knepper.

On the 21st day of June, 1887, the respondent claiming the right by reason of said contract to purchase the same under and by virtue of the fourth section of an act approved March 3, 1887, even as against the homestead and settle-

ment rights of complainant herein, though respondent had never resided upon said land or cultivated the same or in any manner attempted to comply with the homestead and settlement laws of the United States for obtaining government land; that upon hearing thereon before the register and receiver a decision was rendered in favor of complainant awarding him the land under his homestead entry. Respondent appealed therefrom to the commissioner of the general land office, which decision of the register and receiver was affirmed by that officer. Respondent further appealed from the decision of the commissioner to the secretary of the interior, who reversed the decision of the register and receiver, and of the honorable commissioner.

This action was brought to reverse the decision of the secretary of the interior, and for a decree, cancelling and declaring void the patent issued to Elmira Knepper. The respondent filed a general demurrer to the bill, which was overruled; the respondent declining to further plead a decree was rendered in favor of complainant, setting aside and cancelling the patent issued by the secretary of the interior to Elmira Knepper, and quieting the title in John Sands, respondent herein. From this decision respondent appealed to the United States Circuit Court of Appeals. This cause is not before the court upon the grounds upon which it was placed in argument by counsel for respondent upon the general demurrer to the bill. Only two questions have been certified to this court by the United States Circuit Court of Appeals. The demurrer admits the facts and refers the law arising thereon to this court. The first question certified to this court involves the construction of an act of congress approved May 12, 1864, granting certain lands to the state of Iowa for the purpose of aiding in the construction of a railroad from Sioux City, in said state, to the south line of the

state of Minnesota, also to said state for the use and benefit of the McGregor Western Railroad Company for the purpose of aiding in the construction of a railroad from South McGregor in a westerly direction until it shall intercept the said road running from Sioux City to the Minnesota state line, in the county of O'Brien. Also an act of the general assembly of the State of Iowa, entitled, "An act to resume all the lands and rights conferred upon the Sioux City and St. Paul Railroad Company, by or under an act of congress, approved May 12, 1864, to lands not heretofore earned by said company." Approved March 16, 1882. The acts referred to are set out on pages 1 to 4 of the record.

Appellee contends that by an act of the general assembly approved March 16, 1882, resuming the" lands not heretofore earned by said company" was a full, complete and final adjustment of the grant so far as the said Sioux City and St. Paul Railroad Company was concerned. The land in controversy is within the ten-mile limit of said grant, and a part of the land patented to the State of Iowa for the use and benefit of the Sioux City and St. Paul Railroad Company, and withheld from the company by the state for the reason that the state had conveyed to the company all of the lands to which it was entitled under the provisions of the granting act, for constructing five sections or fifty miles of said road.

The State of Iowa accepted the grant by an act of the general assembly, approved April 3, 1866, and by the same act conferred upon the Sioux City and St. Paul Railroad Company so much of the lands as may be granted and conferred under the provisions of the said act of congress, for the purpose of aiding in the construction of a railroad from Sioux City, Iowa, to the south line of the State of Minnesota.

By another act of the general assembly of the State of

Iowa, approved April 20, 1856, the State of Iowa accepted the said grant and trust conferred upon the state by an act of congress approved May 12, 1864, to aid in the construction of a railroad in said state, upon the conditions and restrictions contained in the said act of congress.

Section 2 of said act provides: "Whenever any lands shall be patented to the State of Iowa in accordance with the provisions of said act of congress, said lands shall be held by the state in trust for the benefit of the railroad company entitled to the same by virtue of said act of congress, and to be deeded to said railroad company as shall be ordered by the legislature of the State of Iowa."

September 19, 1866, the Sioux City and St. Paul Railroad Company duly accepted said grant, and on the 20th day of September, 1866, filed in the office of the secretary of Iowa evidence of such acceptance. July 10th, 1867, the Sioux City and St. Paul Railroad Company filed in the office of the secretary of the State of Iowa a map of definite location of said road, and a certified copy of same was filed in the department of the interior July 17, 1867.

In 1872 the company began the construction of the road from a point on the south line of the State of Minnesota to Lemars, in Plymouth county, Iowa, to a connection with the Iowa Falls and Sioux City Railroad, now owned and operated by the Illinois Central Railroad Company, and completed it early in 1873, the length of the constructed line being 56.13 miles.

July 26, 1872, the governor of the State of Iowa certified to the secretary of the interior, as provided by section 4 of the act of May 12, 1864, to the completion of two sections or twenty miles of road from the Minnesota state line, and on the 10th day of August, 1872, duly certified to the further construction of another section of ten miles, and on

the 4th day of February, 1873, also certified to the further construction of two sections or twenty miles of road, in all five sections, being fifty continuous miles of constructed road, from the south line of the State of Minnesota in the direction of Sioux City.

The company also constructed 6.13 miles of road in addition to the said five sections.

The secretary of the interior patented to the State of Iowa, for the use and benefit of the Sioux City and St. Paul Railroad Company, 407,910.21 acres of land (less 40 acres twice patented), as follows:

October 16, 1872	191,464.04
June 17, 1873	205,374.76
January 25, 1875	10,911.41
June 4, 1877	160
	407,910.21
	40
	407,870.21

Of which 212,067.66 acres is within the granted ten-mile limits, and 195,842.55 acres is within the indemnity or twenty-mile limit.

The state certified to the Sioux City and St. Paul Railroad Company, as inuring to it under the grant for the construction of five sections, 322,412.81 acres, 186,186.77 acres being within the granted limit and 136,226.04 acres within the indemnity limits. Of the lands certified to the Sioux City and St. Paul Railroad Company within the granted limits, there was lost to said company, in an action wherein the Chicago, Milwaukee and St. Paul Railway Company was plaintiff and the Sioux City and St. Paul Railroad Company was defendant, which was an action to determine the interest of the parties to the lands within the overlapping limits

of the grant, 14,640.06, leaving 171,546.71 acres. There was also lost to the same company in same action, within the indemnity limits, 27,047.46, leaving 109,178.58 acres, making the total of lands lost to the Sioux City and St. Paul Railroad Company, which had been certified to the company by the State of Iowa, 41,687.52 acres; so that there remained to the Sioux City and St. Paul Railroad Company, of the lands certified to it, 280,725.29 acres. As before stated, the Sioux City and St Paul Railroad Company accepted said grant on the 20th day of September, 1866, but having failed to complete the road from Sioux City to Lemars the general assembly of the State of Iowa, by an act approved March 16, 1882, entitled "An act to resume all the lands and rights conferred upon the Sioux City and St. Paul Railroad Company, by or under the act of congress approved May 12, 1864, to the lands not heretofore earned by said company," thereby resuming to itself the title to all of the unearned lands.

Section 1 of said act is as follows: "That all lands and rights to lands, granted or intended to be granted to the Sioux City and St. Paul Railroad Company by said act of congress and of the general assembly of the State of Iowa, which have not been earned by said railroad company by a compliance with the conditions of said grant, be and the same are hereby absolutely and entirely resumed by the State of Iowa, and that the same are absolutely vested in said state as if the same had never been granted to said railroad company." Approved March 16, 1882.

And thereafter the legislature of the State of Iowa, in order to reinvest the title to all the lands in the United States that had not been certified to the Sioux City and St. Paul Railroad Company by an act approved March 27, 1884, authorized and directed the governor of the State of Iowa to

certify to the secretary of the interior all lands which had been patented to the State of Iowa to aid in the construction of said railroad, and which have not been patented by the state to the Sioux City and St. Paul Railroad Company, not including the lands situated in the counties of Dickinson and O'Brien.

And in compliance with the said act of the legislature of the State of Iowa, William Larrabee, the then governor of Iowa, executed a deed of conveyance to the United States, dated January 12, 1887, conveying all the lands then held by the state, not including the lands situated in the counties of Dickinson and O'Brien, amounting to 26,017.33 acres.

At this time the secretary of the interior had patented to the State of Iowa		407,870.21
Of this amount the state had conveyed to the company		322,412.81
Leaving in the state		85,457.40
Of this amount there had been decreed to the Milwaukee Company	37,747.89	
Reconveyed to the United States	26,017.33	63,765.22
The state retaining title to		21,698.18

In Jannary, 1887, an application was filed in the department of the interior in behalf of certain settlers in O'Brien county, requesting suit be commenced and prosecuted in the name of the United States, to assert title to lands in O'Brien county claimed by the Sioux City and St. Paul Railroad Company and the Chicago, Milwaukee and St. Paul Railway Company, under and by virtue of a grant to the State of Iowa, by act of congress approved May 12, 1864, averring that they, the said applicants, are settlers upon said land, and that they are seeking to acquire title to the same under the settlement laws of the United States. Acting upon said application the secretary of the interior made a decision

thereon July 26, 1887, in which he directed the honorable commissioner to make a "complete adjustment of the grant in accordance with the views expressed in his decision, and make a demand upon the Sioux City and St. Paul Railroad Company, and upon the State of Iowa, for the relinquishment and reconveyance to the United States for 17,580.30 acres, or such quantity as the completed adjustment in accordance with the principles by him enunciated will show to be wrongfully held by the state under patents from the United States." (6 U. S. Land Dec. 51.)

August 11th, 1887, the honorable commissioner completed the adjustment as directed by the secretary of the interior and forwarded same to the Hon. Wm. Larrabee, governor of the State of Iowa, in which he found that of the 85,457.40 acres patented to the state but withheld from the company, 26,017.33 acres had been reconveyed to the United States and ordered restored to market, and 37,747.89 acres had been awarded to the Chicago, Milwaukee and St. Paul Railway Company by a decision of the supreme court, leaving 21,692.18 acres still withheld by the state, and requested the governor to reconvey to the United States this 21,692.18 acres, with a further notice that upon failure to make a reconveyance within ninety days a suit would be instituted for the recovery of the land.

The governor of the State of Iowa, having failed to reconvey to the United States the land withheld by the state, a suit was commenced in the circuit court of the United States at the October term, 1889, in which the United States of America was plaintiff and the Sioux City and St. Paul Railroad Company et al. were defendants, for the purpose of recovering the title to the lands thus held by the State of Iowa, by conveyance from the United States for the use and benefit of the Sioux City and St. Paul Railroad Company.

Later the Chicago, Milwaukee and St. Paul Railway Company and the settlers upon the land filed cross-bills setting forth their claims to the land.

June 1st, 1891, a decree was entered in said court quieting the title in complainant, the United States of America, to the lands described, amounting to 21,979.85 acres, as against the defendant, the Chicago, Milwaukee and St. Paul Railway Company, and that said defendant be forever barred and estopped to have and assert any right, title or interest to the lands adverse to the title of plaintiff; that the cross-bill of the settlers be dismissed without prejudice.

The Sioux City and St. Paul Railroad Company and the Chicago, Milwaukee and St. Paul Railway Company perfected an appeal to the Supreme Court of the United States, from the decision of the circuit court, which was affirmed October 21, 1895.

The first question presented for the consideration of the court in the order stated, is: "In view of the provisions of the act of congress of May 12, 1864, by virtue of which the land in controversy was granted to the State of Iowa, did the action which was subsequently taken in manner and form aforsaid, by the governor and legislature of the State of Iowa, operate as a final adjustment of the grant so far as the Sioux City and St. Paul Railroad Company was concerned, and by virtue of its being so adjusted, exempt, or except the grant in question from the provisions of the adjustment act of March 3, 1887?" The purpose of the grant was for the purpose of aiding the State of Iowa in the construction of a railroad from Sioux City, Iowa, to the south line of the State of Minnesota. The grant is for every alternate section of land designated by odd numbers for ten sections in width on each side of said road, and including the usual provisions for indemnity lands; and further provides

that when the governor of the state shall certify to the secretary of the interior to the construction of ten consecutive miles of road, the secretary shall issue to the state, patents for one hundred sections of land for the benefit of the company, and so on from time to time as sections of the road are constructed until the said road has been completed, when the whole of the land granted shall be patented to the state for the use and benefit of the railroad company; and further provides that if the said road is not completed within ten years from the acceptance of the grant, the lands granted and not patented shall revert to the State of Iowa for the purpose of securing the completion of said road within such time not to exceed five years, and upon such terms as the state shall determine, with the further provision that the said lands shall not in any manner be disposed of or encumbered except as the same are patented under the provisions of said act, and should the state fail to complete said road within five years after the ten years aforesaid, then the lands undisposed of shall revert to the United States.

It appears from the certificate (page 3) that on April 3, 1866, the State of Iowa accepted said grant, and on the same day, by appropriate legislative action, ~~confirmed~~ confers that part of the grant made in aid of the construction of a railroad from Sioux City to the south line of the State of Minnesota upon the Sioux City and St. Paul Railroad Company, said grant being made upon the terms, conditions and restrictions contained in an act of congress of May 12, 1864; that the said railroad company accepted said grant from the state and entered upon the construction of the road, but only completed five sections of ten miles each, extending from the Minnesota state line southward to the town of Lemars, and received from the State of Iowa the amount it was entitled to by reason of the construction of such part of its road; that in a

message to the legislature of the State of Iowa, delivered in January, 1882, the governor of the state directed the attention of the legislature to the fact that the railroad company aforesaid had failed to complete its road in accordance with the terms of the grant and advised the legislature of his refusal to convey any more lands to said railroad company, because it had received all the land it was entitled to, and recommended that appropriate legislative action be taken. Following this, and on March 16, 1882, the legislature of the State of Iowa resumed to itself all of the said unearned lands.

Can there be any question but what the title to the lands granted to the State of Iowa for the use and benefit of the Sioux City and St. Paul Railroad Company, and withheld by the state revested in the State of Iowa after the resumption act of March 16, 1882; if so, how can the act of March 3, 1887, apply?

What was the purpose and object of the act of March 3, 1887?

The title of the act is as follows: "An act to provide for the adjustment of the land grants made by congress to aid in the construction of railroads, and for the purpose of forfeiture of unearned lands, and for other purposes."

The enacting clause is as follows: "Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the secretary of the interior be and is hereby authorized and directed to immediately adjust, in accordance with the decisions of the supreme court, each of the land grants made by congress to aid in the construction of railroads heretofore unadjusted."

Our contention is, that the grant was fully and completely adjusted by the resumption act of the general assembly of the State of Iowa, approved March 16, 1882. The

granting act provides (sec. 6, Act 1864): "Provided further, that if the said roads are not completed within ten years from their several acceptance of this grant, that said lands hereby granted and not patented shall revert to the State of Iowa, for the purpose of securing the completion of said roads within such time not to exceed five years, and upon such terms as the state shall determine; and provided further, * * * and should the state fail to complete said road within five years after the ten years aforesaid, then the said lands undisposed of shall revert to the United States."

The disposition of the lands granted to the state under the act of May 12, 1864, was, by the terms and conditions of the grant, left to the state. Section 3 of said act provides: "That the lands hereby granted shall be subject to the disposal of the legislature of Iowa for the purposes aforesaid and no other." Section 4 provides: "When the governor of the state shall certify to the secretary of the interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial and workmanlike manner, the secretary shall issue to the state patents for one hundred sections of land, for the benefit of the road having completed the ten miles, and so on, from time to time, as other sections have been completed." The Sioux City and St. Paul Railroad Company having completed only five sections of ten miles each, would, under the terms and conditions of the grant, be entitled to five hundred sections of land, or 320,000 acres.

Any conveyance of land in excess of this amount would be absolutely void.

The act referred to provides that the company accepting the grant of lands shall take the same with the conditions imposed and the terms provided in the act.

The act of the legislature of Iowa, approved April 3, 1866, also accepted said grant and the trust conferred upon the

state by the act of congress, approved May 12, 1864, to aid in the construction of a railroad in said state upon the conditions and restrictions contained in said act of congress.

It will be seen that the grant was accepted by the legislature upon the *terms, conditions and restrictions* contained in said act of congress.

We have shown that the total amount of land that could be patented to the state for constructing five sections is 320,000 acres; yet it appears that the secretary of the interior patented to the state 407,870.21 acres. Of this amount the state conveyed to the Sioux City and St. Paul Railroad Company 322,412 31 acres, 2,412.81 acres more than the company was entitled to.

"A conveyance of land in excess of the lands earned is void."

Jackson L. & S. R. Co. vs. Davidson, 32 N. W. Rep. 73.
Farnsworth vs. Minn. & Pac. R. R. Co. 92 U. S. 49.

In the latter case the court said: "Where congress makes the construction of portions of a railroad a condition precedent to a conveyance of any other parcel by the state, no conveyance in disregard of these conditions could pass any title to the company."

The court further says: "The evident intention of congress was to secure the proceeds of the land for the work designed, and to prevent any alienation in advance of the construction of the road, with the exception of 120 sections. The act made the construction of a portion of the road a condition precedent to any other part of the road."

It was so held in Schulenberg vs. Harriman, 21st Wall. 44: "Where we had occasion to consider provisions of statute identical with the terms of the one before us."

To the same effect is the case of United States vs. Childers, 12th Fed. Rep. 586.

The grant to the State of Iowa approved May 12, 1864, is unlike any other grant. The grant provides "that if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the State of Iowa."

This is the only grant of congress that provides for a forfeiture and resumption by the state, in case of a non-compliance with the terms and conditions of the granting act.

In all other grants of congress there is no provision in the granting act for reversion to the state, in case of a non-compliance with the conditions imposed by the grant. On the contrary, all other acts provide that the land shall, in case of forfeiture, revert to the United States.

The state accepted the grant April 3, and again April 20, 1866, and by the same acts conferred the lands granted upon the Sioux City and St. Paul Railroad Company. The state accepted the grant of May 12, 1864, upon the terms, conditions and restrictions contained in said act of congress.

The language of the granting act is "that there be and is hereby granted to the state of Iowa," etc. The language employed in all other grants of congrees is not the same as in the act of congress of May 12, 1864. In the former the acts provide that in case of non-compliance with the terms and conditions of the grant that the unearned lands shall revert to the United States; in the latter the act provides that the lands shall revert to the state. Under the act referred to the title to the lands, under the grant, passed to the state. In neither case would the lands revert to the United States or the state by reason of a failure to perform the conditions subsequent. The legal and equitable title would remain in the grantees until a forfeiture has been asserted.

In the case of Francoeur vs. Newhouse, reported in 40th Fed. 618, the court says: "It has been so often decided that

the grant to the railroad company under this, and similar acts, is a grant in praesenti, passing and vesting a present title, only to be defeated by a failure to perform the conditions subsequent, *and suitable judicial proceedings on the part of the United States, to forfeit them*, that it is only necessary to cite the authorities without further discussing the question. Railroad Company vs. Railroad Company, 97 U. S. 496; Schulenberg vs. Harriman, 21 Wall. 44; Van Wick vs. Knevals, 106 U. S. 360, 1 Sup. Ct. Rep. 336. 'There be and is hereby granted' are words of absolute donation, and import a grant in praesenti. This court has held that they can have no other meaning. Railroad Co. vs. U. S. 92 U. S. 741; Wright vs. Roseberry, 121 U. S. 500, 7 Sup. Ct. Rep. 985; Railroad Company vs. Orton, and case cited, 6 Sawy. 198. Mr. Justice Field went over the subject fully in Denny vs. Dodson, 13 Sawy. 32 Fed. Rep. 899, in which he held that not merely the equitable title to the land passed by the legislative grant in praesenti, in such sense that an action of ejectment could be maintained upon it—that the patent provided for was not necessary to pass the title, but was only a convenient instrument of evidence, citing a passage from the opinion of the supreme court in Langdeau vs. Hanes, 21 Wall. 521."

In the case of VanWick vs. Knevals, supra, which is an action to determine the rights of parties to lands within the limits of a grant of congress to the St. Joseph and Denver City Railroad Company, approved July 30, 1866, the court says: "The grant is one in praesenti, except as its operation is affected by that condition; that is, it imports the transfer, subject to the limitations mentioned, of a present interest in the lands designated. The difficulty in immediately giving full operation to it arises from the fact that the sections designated as granted are incapable of identifi-

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cation until the route of the road is 'definitely fixed.' When that route is thus established the grant takes effect upon the sections by relation as of the date of the act of congress. In that sense we say that the grant is one in praesenti. It cuts off all claims, other than those mentioned, to any portion of the lands from the date of the act, and passes the title as fully as though the sections had been capable of identification. Nor is this operation of the grant affected by the fact that patents of the United States are subsequently, upon the certificate of the governor, to be issued by the secretary of the interior directly to the company and not to the state. This is only a mode of divesting the state of her trust character and of passing the legal title held by her to the party for whose benefit the grant was made. The legal title under the grant goes to the state, but the equitable title vests in the company. The state cannot dispose of the lands; she simply holds them for the use and benefit of the company, the act of congress providing how her trust shall be discharged and the legal title be conveyed to the company. The act says that the land granted 'shall inure to the benefit of the said company as follows,' and then proceeds to declare that when the governor of the state shall certify that a section of the road of ten consecutive miles is completed 'in a good, substantial and permanent manner as a first-class railroad,' the secretary of the interior shall issue to the company patents for the sections of land which are opposite and coterminus with the completed road, and that similar patents shall issue upon a like certificate upon the completion of every successive section of ten miles. It matters not, so far as subsequent settlers are concerned, in which manner the title, which has passed out of the United States, is transferred to the company from the state."

Failure to complete a railroad according to the condi-

tions of the grant of lands to the company which has already attached can be asserted as a forfeiture of the grant only by the grantor—United States—through judicial proceedings, or through the action of congress.

Where a grant of land and franchises for the construction of a railroad provides for their forfeiture upon failure to perform work within a prescribed time, the forfeiture may be by legislative act, without judicial proceedings.

Farnsworth vs. Minn. & Pac. R. R. Co., 92 U. S. 49.

Lands granted by congress to aid in the construction of railroads do not revert upon conditions broken until a forfeiture has been asserted by the United States, either through judicial proceedings or by some legislative action sufficient to manifest an intention by congress to reassert the title and resume possession.

St. Louis N. M. & S. R. Co. vs. McGee, 115 U. S. 469.

Under the act in controversy the legal title passed to the state, in trust, however, for the use and benefit of the railroad companies. The act provides that upon completion of sections of ten miles each, evidenced by a certificate of the governor of the State of Iowa to the secretary of the interior, that officer shall issue to the state, patents for one hundred sections of land for the benefit of the road having completed ten miles of road.

Section 2, chap. 144, Act of the General Assembly, Session Laws of Iowa, approved April 20, 1866, provides: "Whenever lands shall be patented to the State of Iowa in accordance with the provisions of said act of congress (May 12, 1864), said land shall be held by the state, in trust, for the benefit of the railroad company, as shall be ordered by the legislature of the State of Iowa at its next regular session, or at any session thereafter."

By an act of the 15th general assembly, entitled "An act authorizing and directing the governor to certify to the Sioux City and St. Paul Railroad Company certain lands therein named."

"Sec. 1. That the governor of the State of Iowa be and is hereby authorized and directed to certify to the Sioux City and St. Paul Railroad Company any and all lands which are now held by the State of Iowa, in trust, for the benefit of the said railroad company, in accordance with the provisions of Sec. 2 of Chapter 144, of the laws of the general assembly."

Prior to the passage of said act the secretary of the interior had patented to the State of Iowa, for the use and benefit of the Sioux City and St. Paul Railroad Company, 396,464.04 acres; 76,838.80 acres more than the railroad company was entitled to for the construction of five sections, or fifty miles of road.

We have already shown that patents conveying land in excess of the amount authorized by the act of congress, is void. Of the amount certified to the railroad company, it was found, in a suit between the Milwaukee Company and the Sioux City Company, that the Milwaukee Company was entitled to 41,687.52 acres, leaving to the company 280,-725.29 acres. (117 U. S. 406.)

Of the excess conveyed to the state 37,747.89 acres was, in the suit referred to, decreed to the Milwaukee Company, and 26,017.33 reconveyed by the State of Iowa to the United States, leaving 26,692.18 acres held by the state after said conveyance.

The report of the secretary of state, for 1883, page 94, will verify what has been said with reference to the amount of lands patented by the United States, number of acres certified to the railroad company by the state, and number of

acres withheld from the railroad company, and the amount of lands lost by the Sioux City Company to the Milwaukee Company by decree of the United States court, as well as lands withheld by the state that were found to belong to the Milwaukee Company. This will also appear by the report of the secretary of state for 1887.

Our contention is, that the granting act of May 12, 1864, granting to the State of Iowa, certain lands, for the purpose of aiding in the construction of two lines of road, as therein provided, to be disposed of by the state for the purposes therein set forth, with the proviso that if the said roads are not completed within ten years after their several acceptance, the said land so granted, and not patented, shall revert to the State of Iowa; that the act of the general assembly of the State of Iowa, approved March 16, 1882, declaring a forfeiture by reason of having failed to comply with the terms and conditions of the grant, and resuming the unearned lands, is a full, final, and complete adjustment of the act.

Sec. 1 of said act provides: "that all lands and all right to lands granted or intended to be granted to the Sioux City and St. Paul Railroad Company, by said acts of congress, and the general assembly of the State of Iowa, which have not been earned by said railroad company, in compliance with the conditions of said grant, be and are hereby absolutely vested in said state, as if the same had never been granted to said railroad company."

The secretary of the interior, recognizing the force and effect of the resumption act, that the lands had been resumed by the state, in a letter addressed to the Hon. Buren R. Sherman, governor of Iowa, under date of February 6, 1883, found in the report of the secretary of state, 1883, in which he says: "If there is no authority vested in you or any

officer of the state to reinvest the United States with the legal title to the unearned lands, I urge upon you the propriety of obtaining such authority from the general assembly as early as possible, in order that such lands may be restored to the public domain.

Following this, and by said act of the general assembly of the State of Iowa approved Mar. 27, 1884, "the governor of the state was authorized and directed to certify to the secretary of the interior all lands which have been heretofore patented to the state to aid in the construction of said railroad, and which have not been patented by the state, to the Sioux City and St. Paul Railroad Company, and the list of lands so certified by the governor shall be presumed to be the lands relinquished and conveyed by section one of this act, provided that nothing in this section contained shall be construed to apply to lands situated in the counties of O'Brien and Dickinson."

In the case of the Sioux City and St. Paul Railroad Company vs. United States (159 U. S. 349), the court says:

"Another contention is, that upon the issuing of the patents of 1872 and 1873 to the state, for the use and benefit of the railroad company, the title vested absolutely in the company, and the lands were thereby freed from restraints or alienations, from conditions subsequent, or from liability to forfeiture. In support of this contention reference is made to Bybee vs. Oregon & C. R. R. Co., 139 U. S. 673, 674, 676, 677 (35, 305, 306, 308); Van Wyck vs. Knevals, 106 U. S. 360 (27-201); Wisconsin Cen. R. Co. vs. Price County, 133 U. S. 469 (33, 687); Desert Land Co. vs. Tarpey, 142 U. S. 241 (35-999); St. Paul & P. R. Co. vs. Northern Pac. R. Co., 139 U. S. 1, 6 (35, 77, 79). But these are cases, as an examination of them will show, in which the grant was directly to the railroad company, or in which the act of congress re-

quired that the patents for lands earned should be issued, not to the state for the benefit of the railroad company, but directly to the company itself. In the case now before us the statute directed patents to be issusd to the state for the benefit of the company; *so that, until the state disposed of the lands, the title was in it, as trustee, and not in the railroad company.* Schulenberg vs. Harriman, 86 U. S., 21 Wall. 59 (22, 554); Lake Superior Ship Canal R. & I. Co. vs. Cunningham, 155 U. S. 372 (39, 189). See, also, McGregor & N. R. Co. vs. Brown, 39 Iowa, 655 (Oct. 23, 1874); Sioux City & St. P. R. R. Co. vs. Osceola County, 43 Iowa, 321 (June 5, 1876). In the case last named, the Sioux City company was relieved from the payment of taxes upon some of the lands patented to the state for its benefit, upon the ground that the legal title was in the state, and the lands for that reason were not taxable. The question is altogether different from what it would be if patents for these lands had been issued, or if the state had conveyed them directly to that company."

Can there be any question but that the title to the land from and after the passage of the act of March 16, 1882, was in the State of Iowa as absolutely as if the same had never been granted to said company?

We desire at this time to call the attention of the court to the provisions of the act of congress of March 3, 1887 (24 St., 556), and the decisions of the secretary of the interior in construing this act.

The first section directs that all railroad land grants, heretofore unadjusted, shall be adjusted without unnecessary delay.

The second section provides for the recovery by the United States of title to lands which, from any cause, have been erroneously certified or patented to, or for the use or

benefit of any company, on account of a railroad grant, whenever the fact may be ascertained that a certificate or patent has been erroneously issued, and prescribed the duties of the secretary of the interior and attorney general in connection therewith.

The third section provides that if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously cancelled on account of any railroad grant or the withdrawal of public lands from market, such settler, upon application shall be reinstated in all his rights, and allowed to perfect his entry by complying with the public land laws, provided that he has not located another claim, or made an entry in lieu of the one so erroneously cancelled; and provided, also, that he did not voluntarily abandon said original entry.

"Sec 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented, as aforesaid, and which have been sold, by the grantee company, to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons, so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase, at the proper land office, within such time, and under such rules, as may be prescribed by the secretary of the interior, after the grants, respectively, shall have been adjusted; and patents to the United States shall issue therefor, and shall revert back to the date of the original certification or patenting, and the secretary of the interior, on behalf of the United States, shall demand payment from the company, which has so disposed of such lands, of an amount equal to the government price of similar lands; and in case of neglect or refusal of said company to make payments, as hereafter

specified, within ninety days after the demand shall have been made, the attorney general shall cause suit or suits to be brought against such company for the said amount. Provided, that nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified or patented as aforesaid, from recovering the purchase money therefor, from the grantee company, less the amount paid to the United States by such company, as by this act required."

"Sec. 5. That when any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to, or for the use of such company, said lands being the numbered sections prescribed in the grant, and being co-terminus with the constructed parts of said road, and where the lands so sold are, for any reason, exempted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof, from said company, to make payment to the United States for said lands, at the ordinary government price for like land, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns. Provided, that all lands shall be exempted from the provisions of this section, which at the date of such sale were in the bona fide occupation of adverse claimants, under the pre-emption or homestead laws of the United States, and whose claim and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries, and receive patents therefor. Provided, further, that this section shall not apply to lands settled upon subsequent to the first day of December, 1882, by persons claiming to enter the same under settlement laws of the United States, as to which lands the parties claiming the same, as aforesaid, shall be entitled to prove up and enter as in other like cases."

The sixth and seventh sections are not material to the issue.

On the 13th day of February, 1889, the commissioner issued instructions to the register and receiver, for their guidance, as to the construction of the provisions of the act of March 3, 1887. With reference to the construction of the 4th section the commissioner says:

"An applicant for land under this section will be required to publish notice of intention to make proof as in pre-emption and homestead cases, and the proof must show:

"1. That he is, or has declared his intention to become a citizen of the United States.

"2. That he is a bona fide purchaser from the company, or some person claiming title under it, and the character of the instrument conveying the land to him.

"3. The amount of purchase money paid to the company.

"4. What part, if any, of the purchase money paid to the company has been refunded to him, or any person acting as his agent?

"5. Whether he has instituted proceedings against the company for the recovery of any portion of the purchase money; if so, for what portion?

"6. The value and character of the improvements, if any, made or acquired by him, upon the land.

"7. Whether there is any person of the first class, under the third section, entitled to the right of entry, under the pre-emption or homestead laws."

(The person referred to, being of the first class, under the third section, as laid down by the commissioner in his instructions to the register and receiver, is as follows: "First, bona fide settlers, whose homestead or pre-emption entries have been erroneously cancelled, on account of the railroad grant or withdrawal.")

Upon the submission of satisfactory proof, as prescribed above, the register will issue certificates in duplicate—numbered in the regular cash series—with annotations thereon, showing that the entry is allowed, without payment, under the fourth section of the act of March 3, 1887.

Counsel in his argument says: "The first question, and to some extent the second, calls for a construction of an important part of the act of May 12, 1864, and the two acts of the legislature of the State of Iowa designated in the certificate," and further says: "This was a grant of land to the State of Iowa in trust for the purpose of securing through the aid thereby from two railroads. * * * The lands granted were subject to the disposal of the State of Iowa. The manner in which this should be done is fully set forth. This section contains most important provisions which bear forcibly upon the first question." This we may concede. The state could not dispose of any of the lands except in compliance with the provisions of said act. The act provides "That if the said roads are not completed within 10 years from the date of their several acceptances of the grant, the said lands hereby granted and not patented, shall revert to the State of Iowa for the purpose of securing the completion of the said roads within such time not to exceed five years, and upon such terms as the State shall determine."

Counsel further says: "It is apparant that this grant did not contemplate that any of the lands included within its terms shall not be disposed of by the state for any other purpose than the one named herein; that should the state fail to complete said road (after resuming the land referred to in case either company should fail to complete within ten years given in which to complete them or either) then it should have no further power over them." While it is true, the act limits the time in which the road should be completed or a

time in which the company would have to complete the road, yet the lands undisposed of would not revert to the state by operation of law so as to extinguish the equitable title held by the company. Had the company completed the road any time, say within twenty years, the company would be entitled to all of the lands applicable to the grant in the event no forfeiture had been declared, or the lands resumed by the state. In the same way the state would not be limited to the time provided in the act had there not been a declaration of forfeiture by the United States, or judicial proceedings to recover title to the land.

Counsel, further contending, on page 7 of his brief says: "It cannot be shown that in the grant of May 12, 1864, nor in any subsequent act of congress, power was given the State of Iowa to thus assume control of these lands after fifteen years following their acceptance by the Sioux City and St. Paul Company. The state simply attempted to usurp power it did not possess, undoubtedly hoping congress would come to its relief and later give the lands to the state for some approved purpose. This was never done. Now while it may have been proper for the state to ascertain whether the company had received its proper quantity of land so that a further and possibly unearned quantity might not be patented to it by the state, yet this ascertainment of quantity and the fact that the number of the excess of land held by the state was also by the same process ascertained, it does not at all follow that the state did, or had, power to adjust the grant as between the company and the United States." It can hardly be contended that the State of Iowa did not under the provisions of the granting act of May 12, 1864, have the right to resume to itself all of the unearned lands.

We have shown that under the provisions of this grant the secretary of the interior could only patent to the state,

for the use and benefit of the company, the amount of lands provided in this act. It is only a matter of computation. The company built five sections of ten miles each, making fifty miles, and the secretary of the interior could only, under the provisions of the act aforesaid, patent to the state for the use of said company, 320,000 acres. While it is true that the secretary of the interior did inadvertantly patent to the State of Iowa 87,880.21 acres of land in excess of the land authorized by the act, it does not follow that the railroad company acquired any interest or claim to the land in excess of the amount provided in said act.

In the case of St. Louis Iron Mountain & Southern Ry. Co. vs. McGee, 115 U. S. 469, the court, in discussing the question with reference to forfeiture of unearned land, says: "It has often been decided that lands granted by congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to the judgment of office found at common law. United States vs. Repentingny, 5 Wall. 211, 267, 268; Schulenberg vs. Harriman, 21 Wall. 44, 63; Farnsworth vs. Minnesota & Pacific R. R. Co., 92 U. S. 49, 66; M'Micken vs. United States, 97 U. S. 217, 218; Van Wick vs. Knevals, 106 U. S. 360."

We have called the attention of the court to the provisions of the act of 1887, and of the steps necessary to take in order to acquire title to lands from the United States under the provisions of that act. It is evident that at the time of the passage of the act of March 3, 1887, some of the land grants had not been adjusted, and in order that the grants should be finally settled and adjusted congress passed the act referred to. If the grant had been adjusted by the re-

sumption act of March 16, 1882, then the provisions of the act of March 3, 1887, would not apply, and the company could not dispose of any of the lands, and the purchasers from the railroad company could not be deemed good faith purchasers within the meaning of that act.

The first section directs that "All railroad grants heretofore unadjusted shall be adjusted without unnecessary delay." While it is true, as heretofore stated, that on the 12th day of January, 1887, the settlers residing upon the land made application to the secretary of the interior asking that suit be commenced to recover title to the land in controversy, including other lands. At that time the state held the title to 21,692.18 acres, and the commissioner, in completing the adjustment as directed by the commissioner, so found. The adjustment, such as it was, was not made under the provisions of that act. The secretary of the interior directed the commissioner to complete the adjustment "in accordance with the principles herein enunciated," and make demand upon the Sioux City & St. Paul R. R. Co. and upon the State of Iowa for the relinquishment and reconveyance to the United States. As a result of such investigation, the commissioner found that the state withheld 21,692.18 acres, and later the attorney general was directed to bring suit for the recovery of this land. Let us admit, for the sake of the argument, that the grant was unadjusted and subject to adjustment by the secretary of the interior, the only one authorized under the provisions of the act of March 3, 1887, to make the adjustment; we must necessarily conclude that the adjustment was completed on the 11th day of August, 1887.

The suit that was instituted by the United States against the Sioux City and St. Paul Railroad Company was for the purpose of enforcing the adjustment and securing the title to

the 21,692.18 acres in the United States. No one will contend that the legal and equitable title to the land in controversy was in the Sioux City and St. Paul Railroad Company. One of the allegations in the bill filed by the United States against the railroad company is: "That of the lands referred to in Par. 16 hereof, the State of Iowa still holds the legal title to the following described lands, situated in the counties of Dickinson and O'Brien, in the State of Iowa," and then sets out a description of the land, amounting to 21,692.18 acres, and further alleges "that the said State of Iowa is a sovereign state, and under the federal constitution and statutes cannot be sued in this court nor made a party defendant herein with the said Sioux City and St. Paul Railroad Company; but complainant is informed and believes that the said State of Iowa is ready and willing to abide the final determination of this action, and execute said trust in accordance herewith."

In the opinion of the supreme court in this case upon appeal, Justice Harlan makes use of the following language: "The legislature of Iowa, by the act of March 13, 1874, directed the governor to certify to the Sioux City company, in accordance with the provisions of the act of April 20, 1866, any and all lands then held in trust for its benefit." The act, though, only required conveyance of such of the trust lands held by the state as the company was entitled to by virtue of the act of congress.

For this reason, it is suggested, the governor did not convey the 85,457.40 acres that remained after conveying to the company 322,412.81 acres of the 407,870.21. * * "Giving effect to these rules of statutory interpretation, we cannot suppose that congress intended that the railroad company should have the benefit of more lands than it earned. As the lands granted could only be devoted to the

construction of the Sioux City road, from Sioux City to the Minnesota line, and as the state holding the legal title in trust has not disposed of and does not intend to dispose of them for the purpose of completing that part of the road located between Sioux City and Lemars, we perceive no reason why, within the meaning of the act of 1864, these lands may not be regarded as 'undisposed of' and equitably the property of the United States if it be true that the railroad company has received as much of the public lands as it was entitled to have on account of constructed road certified by the governor of the state."

"This was the interpretation placed by the state upon the act of congress, for by the act of the Iowa legislature of March 16, 1882, the state, because of the failure of the Sioux City company to construct any road between Sioux City and Lemars, resumed the title to all lands that had not been 'earned' by the railroad company; by a subsequent statute of March 27, 1884, it relinquished and conveyed to the United States all lands and rights to lands resumed and intended to be resumed by the previous act."

By the second section of the same act the governor was directed to certify to the secretary of the interior, all lands which have not been patented by the state to the company, not including the lands in Dickinson and O'Brien counties. January 12th, 1887, the governor certified to the secretary of the interior 26,017.33 acres in Woodbury and O'Brien counties.

Counsel for appellant says: "This proviso is very significant, for if it had any effect upon the lands in controversy and others in the same condition, the effect was to retain the title thereto, and unless the United States has taken action to recover said lands and has recovered them they remain in

the state, and while the title remains in the state no settler has ever had right of entry upon any of them."

The fact, nevertheless, remains that the title to the lands was in the state at that time, and it is immaterial for the purpose of this case why the lands in Dickinson and O'Brien counties were excepted. By the second section of the act of the general assembly approved March 27, 1884, the state held the legal title to the lands as trustee for the United States. This did not change the character of the lands. They were what is known as "government lands," and as such subject to entry.

Counsel, on page 11 of his brief, refers to the case of Vicksburg S. & P. R. R. Co. vs. Elsmore, 15 Southern, 701. The facts in that case are unlike the facts in this case. In that case the lands were granted by the United States to the State of Louisiana for the use and benefit of the Vicksburg S. & P. R. Co. The time was limited by the grant for the completion of the road to ten years. The defendant, after the expiration of ten years, settled upon the land with a view of taking it as a homestead, and insisted that the lands had reverted to the United States by lapse of time, i. e. that is the ten years; that the legislature of Louisiana had declared the grant forfeited.

The court, in the opinion, says: "It is true the railroad was not completed within the time stipulated in the grant. It is also true, we believe, there was a deviation from the line originally designed for the road. It is equally true the road has been completed and the United States has never insisted on any cause of forfeiture and has never forfeited the grant. From time to time certificates of the completion of the road have been filed in the office of the commissioner of the general land office, and though long after the ten year limit, have been accepted as satisfactory evidence of compliance

with the grant. So long as the grantor interposes no objection, we cannot perceive the right of defendants to urge noncompliance with conditions we must deem waived by the grantor. Nor can we understand how the State of Louisiana can forfeit lands or declare annulled the grant of 1856. The state has no interest. It was the trustee under the act of 1856, but its functions have long since ceased and before the legislative act in which it undertook to annull the grant."

We have shown that all of the unearned lands were resumed by the state by the act of March 16, 1882, and subsequently relinquished to the United States, the result of which was to make a final and complete adjustment of the grant. It is true, the commissioner undertook to make an adjustment under the direction of the secretary of the interior. If, as we contend, the grant was not subject to adjustment under the provisions of the act of March 3, 1887, the fact that the adjustment was made by that officer cannot prejudice appellee in his claim under his homestead entry, or in any way inure to the benefit of appellant.

Counsel, however, insists that the grant was fully adjusted by a decision of the supreme court October 21, 1895. The object of that suit, as declared by the complaint, was to recover title from the railroad company to the lands withheld by the state. The railroad company contended that it was entitled to lands for constructing 6.13 miles of road in addition to the five sections of ten miles each. The company further contended that it was entitled to lands in lieu of those awarded the Milwaukee Company, in the common place limits of the two intersecting roads. Another contention is that upon the issuing of the patents to the state for the use and benefit of the railroad company the title vested absolutely in the company and the lands were thereby freed from

restraints or alienation, from conditions subsequent or from liability to forfeiture.

Other defenses were interposed to which we need not refer. The court, however, found against the company, rendering judgment and decree, quieting the title in the United States to the 21,692.18 acres.

In view of what has been said, we feel confident our position is well taken and should be sustained.

II.

The second question in the certificate is, whether the claim of Elmira Knepper, appellee, as a purchaser of the land in controversy under the provisions of the act of March 3, 1887, is superior to that of John A. Sands, a settler upon the land. The facts as disclosed in the records show that Sands settled upon the land in 1884, with a view of establishing a homestead thereon, that his residence has been continuous since that time, and that he has made improvements thereon of the value of $1,750.

Elmira Knepper entered into a contract with the Sioux City and St. Paul Railroad Company for the purchase of said land June 21, 1887, and in virtue of the provisions of the 4th section of the act of congress, making provision for the adjustment of railroad land grants and other purposes, approved March 3, 1887. Sands renewed his homestead application March 10, 1896, after the secretary of the interior in a published circular of date Nov. 8, 1895, had declared the land subject to disposal by the United States. Elmira Knepper also filed her claim to the land as a good faith purchaser from the railroad company. The contest between the parties thus inaugurated was tried and determined before the register and receiver and resulted in the finding by such officers that Sands, by virtue of his settlement upon the land and

continued residence thereon and cultivation thereof, and in full compliance with the laws of the United States, was entitled to a patent from the United States. Elmira Knepper appealed from such decision to the commissioner of the general land office, and on July 20, 1899, who likewise held that Sands, the appellee, was entitled to a patent for the land. The commissioner in his decision, after reciting the facts, says:

"As to Elmira Knepper and Sands, the 4th section of the act of March 3, 1887, provides relief for those persons who had in good faith purchased land from the railroad companies which had been patented and certified thereto, but which in subsequent proceedings should be found not to be within purview of the grant.

"In the construction of this statute it has been repeatedly ruled by this office that good faith is not manifested where at the time of the purchase the purchaser is aware that the land is settled upon and occupied by one claiming the tract to be public land and is holding it under the public settlement laws with the intention to enter the same should it become subject to entry.

"Now in the case at bar, the testimony clearly proves that Mrs. Elmira Knepper, the purchaser, residing on the adjoining land with her husband, was fully aware that Sands was residing upon the land as early as 1884, had seen him there, had made no objection to his occupancy, so she had personal knowledge of settlement and claim at the time of the purchase."

A further appeal was taken from such decision by Elmira Knepper to the secretary of the interior, who, on April 24, 1900, reversed the decision of the register and receiver and also of the commissioner, and thereupon rejected the application of Sands to enter the land as a homestead.

Following this decision a patent was issued to Elmira Knepper for the land in controversy. The secretary of the interior in his decision says: "There is nothing to show that the purchase was not made in good faith, relying upon the title of the railroad company under the outstanding patent issued for its use and benefit June 17, 1873, long before Sands' settlement upon the tract. The possession of Sands at the time of Mrs. Knepper's purchase is relied upon as making the purchase one in bad faith."

By a recent departmental decision in the case of Towe vs. Manley (29 L. D. 504), it was, in effect, held "that the fact that the land had been settled upon prior to the date of the purchase thereof from the railroad company, but after the patenting of the tract to the state for the use and benefit of the company on the faith of which the purchase was made, there being no entry or other claim to the land at the time of the patenting, does not affect the bona fides of the purchaser or prevent a confirmation of title in the purchaser under section 4 of the act of March 3, 1887. The land was not then subject to entry, having been withdrawn therefrom on account of the grant of the railroad company and the patenting of the land to the state as trustee for the company."

Counsel well says: "The bill makes no charge whatever of fraud against the appellant." The only question that the court is called upon to determine under this branch of the case is whether appellant can maintain her claim to the land under the facts as shown as against appellee's homestead claim. The bill charges that the secretary erred in reversing the commissioner in favor of appellant and patenting the land to her.

Stated in another form: Was it the purpose of congress in providing for the "forfeiture of unearned lands" that be-

longed to the United States to give purchasers from the railroad company preference over actual settlers thereon, claiming the same under the settlement laws of the United States?

Admitting, for the sake of the argument, that the controlling question is, and must necessarily turn upon the construction of section 4. If it was the purpose and intent of congress to cut off all claims of settlement, unless it is shown that these claims were initiated anterior to the date of the patenting of land to the state, and gave to the Sioux City & St. Paul Railroad Company the right to enter into contracts for the sale of these lands, without reference to other claimants at the date of such sale, then, and in that case, the railroad company had the right to dispose of these lands at any time after the passage of this act. If this could be done what was there to prevent the company from immediately after the passage of the act of congress, March 3, 1887, entering into a contract with this party for the sale of the entire tract, to-wit: 21,692.18 acres? All that would be necessary to substantiate his claim would be, according to the decision of the secretary of the interior, to show, or rather a failure on the part of the contesting claimants to show, that his claim to the land was not made prior to the date of the patent to the state. This, in itself, would be conclusive evidence that the lands "which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such at the proper land office." This is the language of the statute: "The person or persons so purchasing in good faith." The only showing necessary to be made of good faith is to show that the party purchasing has entered into a contract with

the company for the purchase of the land. They are not in any way limited to quantity. Any person that can make proof that he holds a contract of purchase from the company is conclusive evidence of good faith upon his part. Appellee is not making claim to the land on homestead or pre-emption entry made prior to the time the lands were patented to the state.

It has always been the policy of the government to hold all government lands for actual settlers, except in cases where grants of congress have been made for the purpose of internal improvements. These lands were included within the grant to the State of Iowa, for the purpose of aiding in the construction of a railroad from Sioux City to the south line of the State of Minnesota. The Sioux City & St. Paul Railroad Company, in effect, entered into a contract with the State of Iowa, to build the road between these two points. The time for the completion of the road was limited in the contract. The company failed to construct the road within the time, and under the terms of the contract forfeited all rights thereunder, and to all the benefits of the terms and conditions of the contract, except so far as to hold whatever amount of lands they had received for the construction of fifty miles of road, which had been patented to it by the state. After this the state resumed all the unearned lands by an act of the legislature approved March 16, 1882, and thus ended the contract. All of the lands enuring to the Sioux City & St. Paul Railroad Company, under the grant of May 12, 1864, had been patented to the company.

In the case of the Sioux City & St. Paul Company vs. United States, supra, it is said: "If the terms of an act of congress, granting public lands, admit of different meanings, one of extension and the other of limitation, they must be

accepted in a sense favorable to the grantor, and if rights claimed under the government be set against it, they must be so clearly defined that there can be no question of the purpose of congress to confer them. Leavenworth, &c., R. R. Co. vs. U. S. 95 U. S. 733-740.

"Acts of this character must receive such construction as will carry out the intent of congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyances. Winona & St. Peter R. R. vs. Barney, 113 U. S. 618-625. Nothing is better settled, this court has said, than that statutes should receive a sensible construction, such as will effectuate the legislative intent, and if possible, so as to avoid an unjust or an absurd conclusion. Lau OW Bew vs. U. S., 114 U. S. 47-59.

"Giving effect to these rules of statutory interpretation, we cannot suppose that congress intended that the railroad company should have the benefit of more lands than it earned."

In Lytte vs. Arkansas, 9 How. 314, speaking of a claim under the pre-emption statute, it is said: "It is founded in an enlightened public policy, rendered necessary by the enterprise of our citizens. The adventurous pioneer, who is found in advance of our settlements, encounters many hardships and not infrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed 160 acres. That this is the national feeling is shown by the course of legislation for many years."

In Clements vs. Warner, 24 How. 396, it is declared that "the policy of the federal government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become purchasers of a limited extent of land,

comprehending their improvements, over that of any other person."

In Rector vs. Gibbons, 111 U. S. 276, it is said: "Whenever congress has relieved parties from the consequences of defects in their title, its aim has been to protect those who, in good faith, settled upon public land and made improvements thereon. * * There has been in this respect in the whole legislation of the country, a consistent observance of the rules of national right and justice."

In Northern Pacific Railroad vs. Amacker, 175 U. S. 564, we find the statement that "It was long ago said by this court 'that the policy of the federal government in favor of settlers upon the public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person.' Clements vs. Warner, 24 How. 394-397, and in a later case that 'The law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon.' Ard vs. Brandon, 156 U. S. 537."

In Moss vs. Dowman, 176 U. S. 413, the declaration is that "The obvious purpose of the pre-emption and homestead statutes of the United States is to secure to the actual settler the land upon which he has settled, and to give him the prior right to perfect title by purchase or continued occupation."

It must be borne in mind that appellant is not prosecuting this action under a homestead claim or any other government entry. We may admit for the sake of the argument, that the land in controversy was not subject to homestead entry at the time appellee tendered his homestead application in 1884, for the reason that the land was within the limits of the grant of the Sioux City & St. Paul Railroad Company.

If the land was not subject to homestead settlement, not having been formerly opened to entry, appellee would gain nothing by appealing therefrom. Certainly appellant has no cause for complaint. He was not at the time making claim to the land. Had the land at the time been subject to entry, and appellee failed to appeal from the decision of the register and receiver, refusing his entry, and while in this condition appellee had made an entry on the land, the results might have been different.

Counsel in his argument refers to a number of authorities to sustain his position on this point which we do not desire to controvert for the reason that they do not have any application to the case at bar. Counsel's position, briefly stated, is this, that as the land in controversy at the time of Sand's settlement thereon was government land, Sands could acquire no legal or equitable right thereto. We contend, however, that having settled upon the land with a view of taking it as a homestead, believing it to be government land, in so doing he would acquire a settlement right thereon, as was said by the secretary of the interior in Olson vs. Traver et al., (26 L. D. 350): "Whilst, therefore, one who went upon the land and lived thereon and improved the same during the period when the patent was yet outstanding, could gain no rights by such acts, yet if he was there at the time when the land became subject in due order to settlement, and he was otherwise qualified, he would acquire rights which ought to be protected, notwithstanding the fact that he had previously trespassed upon patented land, the land laws providing no penalty for such trespassing.

"It is not needed that decisions be cited for propositions so plain and so well settled as these."

There can be no question but what the land in controversy is a part of the lands patented to the State of Iowa for the use

and benefit of the Sioux City & St. Paul Railroad Company, but was withheld by the state and is included in the decree in the case of the United States vs. The Sioux City and St. Paul Railroad Company, in which it was held that the land belonged to the United States. The next step that was taken by the department of the interior was to open the land to settlement and entry, and in order to accomplish this the honorable commissioner issued a proclamation, under date November 18, 1895, in which he refers to the suit of the United States against the Sioux City & St. Paul Railroad Company for the recovery of title to the land, and a decree quieting the title in the United States, and further says:

"This leaves the title to the lands involved in the suit in the United States and subject to disposal by the department. Therefore, in order to carry their restoration to entry into effect, you will cause to be published for the period of thirty days, in some newspaper of general circulation in the vicinity of the lands, a notice that said lands, a particular description of which will be published with the notice, are restored to the public domain and will be subject to entry on a day to be fixed by the notice, which shall be ninety (90) days from the date of the first publication, and that all persons claiming any part thereof under the act of March 3, 1887 (24 Stat. 556), must come forward within the ninety days immediately following the first publication, and give notice of their claims by publishing their notice of intention to make proof in accordance with the requirements of the circular of February 13, 1889 (8 L. D. 348), upon a day which shall be subsequent to that affixed for the restoration.

"To the end that complications which might arise from the former practice of suspending applications for these lands may be avoided, and the rightful claimants be enabled to acquire title with as little delay as possible, I have to direct

that in the notice of restoration there be inserted a notice to all prior applicants that their applications confer no rights upon them, and that upon the day set by you for restoration, the lands will be open to entry and disposal without regard to such applications, which shall be held by the notice to be rejected.

"That all such applicants may, however, have opportunity to present new applications upon the expiration of the ninety days' notice, you will notify specially all parties shown by your records to have pending applications for these lands, of the rejection thereof, of the date of restoration, and of the necessity of presenting new applications for the protection of their rights.

"In all cases of conflicting claims, you will proceed in accordance with the rules of practice in contest cases.

"A list of the lands to be restored by descriptive subdivisions is enclosed herein."

The order of the commissioner directs that notice of restoration be published. That in the notice of restoration there be inserted a notice to all prior applicants that their applications confer no rights upon them, and shall be held by the notice to be rejected. The object of this notice was for the purpose of "avoiding complications which might arise from the former practice of suspending applications for these lands may be avoided, and the rightful claimants be enabled to acquire title with as little delay as possible."

There can be no question but what the commissioner treated these lands as government land, and subject to disposal by the land department. And in his order for restoration to entry provides that "the notice shall contain a description of the lands, which shall be published with the notice, and restored to public domain, and will be subject to entry on a day to be fixed by the notice." And further pro-

vides how persons claiming any part of the land under the act of March 3, 1887, may assert their claim.

Appellee bases his claim upon his settlement and continuous, uninterrupted possession of the land, in connection with the improvements made thereon, prior to the passage of the act of March 3, 1887, and prior to the date of appellant's purchase from the railroad company.

It will no doubt be admitted that only for the provisions of this act no one holding a contract of sale from the railroad company could acquire a title to lands within the limits of the grant; that fact is conceded by counsel for appellant, for the reason that he bases his claim wholly upon the provisions of the statute, which, according to the construction placed thereon by the secretary of the interior, "there is nothing to show that the purchase (of Knepper's) was not made in good faith, relying upon the title of the railroad company, under the outstanding patent issued for its use and benefit, June 17, 1873, long before Sand's settlement on the tract."

Counsel seems to lose sight of the fact that the land in dispute was government land at the time and before Sands settled thereon; this the court so found in the case of the United States vs. Sioux City & St. Paul R. R. Co., supra. The honorable commissioner took the necessary steps to dispose of the land by issuing the proclamation or notice heretofore referred to. By said notice all claims to the land were cancelled, and all parties making claims to the land were notified to file new applications within the time directed by the notice. Appellant and appellee filed their respective claims to the land. Both parties were seeking to establish their claim under the act of March 3, 1887.

Counsel, however, contends that "Sands' conduct was certainly an abandonment of his first application for permis-

sion to file homestead entry in 1884, and having abandoned his application made in 1884 and presented two thereafter—one in January 21st, 1896, to make proof under the act of March 3, 1887—Sands certainly cannot be held to complain against the decision of the secretary of the interior. He voluntarily appeared in a contest ordered by the commissioner of the general land office and submitted to the hearing of said cause in accordance with said order."

These questions, however, need not be discussed, as they are not involved in the questions raised in the certificate. We will only say in reply, that neither party could secure an adjudication of his claim to the land without complying with the order of the department; it was so understood by appellee and appellant, as they appeared in compliance with said order and made proof of their respective claims.

As heretofore stated, the register and receiver sustained Sands' claim under his settlement entry, which decision was affirmed by the commissioner. This action was brought to set aside this decision. All of the facts and circumstances are fully set out in the bill. Defendant filed a general demurrer to the bill, which was overruled. Defendant failing to further plead, a judgment and decree were entered as prayed.

The secretary, in construing the provisions of the fourth section of the act of 1887, gives it a strict construction, as evidenced by his decision in the Tow-Manley case, wholly ignoring the fact that this is a remedial statute; that the purpose and intent of the statute was to protect the rights and interests of all parties making claim to these lands.

In the case of the United States against the Southern Pacific Railroad Co., supra, the court says: "Section four makes provision for the issue of patents to certain purchasers from railroad companies, providing proof shall be made 'within

such time and under such rules as may be prescribed by the secretary of the interior, after the grants respectively shall have been adjusted.'

"Further, it must be borne in mind that this is a remedial statute, and is to be construed liberally, and so as to effectuate the purpose of congress and secure the relief which was designed, and the mere date of the transaction between the purchaser and the railroad company is not of itself vital in determining whether there is or is not an equity in behalf of the purchaser. As said in Potters Dwarris on Statutes, 231: 'Though a statute gives inaccurate names to things, if the court can discover its meaning it will so expound it as to give force to the intention of the legislature. The sense and spirit of the act, however, are primarily to be regarded in the construction of statutes, and it matters not that the terms used by the legislature in delivering its commands are not the most apt to express its meaning, provided the object be plain and intelligible, and expressed with sufficient distinctness to enable the judge to collect it from any part of the act.'

"The object once understood, judges are so to construe an act as to suppress the mischief or advance the remedy. A remedial act shall be so construed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy. As a general rule a statute ought to be construed liberally. Receiving an equitable or rather a benignant interpretation, the letter of the act will be sometimes enlarged, sometimes restrained, and sometimes, it has been said, the construction made is contrary to the letter, which should be read ultra the letter and confined to ancient statutes."

See, also, the letter of the attorney general to the secretary of the interior, in response to a question as to the true construction of this act (6 L.D. 275): "The whole scope of the law, from the second to the sixth sections inclusive, is reme-

dial. Its intent is to relieve from loss, *settlers and bona fide purchasers*, who, through erroneous or wrongful disposition of the lands in the grant, by the officers of the government or by the railroad, have lost their rights or acquired equities."

All that is required under the provisions of the fourth section, as construed by the secretary, is proof of purchase from the company and payments made thereon. This is conclusive evidence that the purchase was made in good faith.

Let us suppose, by way of illustration, that at the time appellant appeared before the register and receiver, she was the only party appearing and making proof under her contract of purchase. To carry the illustration a little further, let us suppose that all of the claims for these lands were made by contract purchasers from the company, then, under the rulings of the secretary, all that would be necessary on the part of the purchasers would be to make proof of such purchase, and had agreed to pay, and may have paid the contract price, and thus be entitled to a confirmatory patent; and in that way enable the company to indirectly dispose of the land and have the benefit of whatever amount could be obtained from the sale of these lands. The effect of this remedial statute would be far reaching. It would give the company the right to dispose of the lands, which they could not do only for the provisions of this act, and give the purchaser the benefits of this act, by permitting him to acquire title to the land.

In the case at bar, appellant has contracted to pay the railroad company $2,160. Of this amount the government would receive $400, giving the company a clear profit of $1,760 in the transaction; and appellant would receive the benefit of the improvements on the land, which are worth, as found by the secretary, $2,000. This is a fair illustration

of the effect of this remedial statute as construed by the secretary.

For many years congress had been making grants of lands for the purpose of aiding in the construction of railroads. As a result much of the land so granted has been tied up by reason of the failure of the company to comply with the provisions of the grant in not completing the road. While in all the grants of congress provisions are made for a forfeiture of the lands to the United States in the event of failure to complete the road (except in the grant of May 12, 1864, which, as stated, provides for a forfeiture to the state), but in many instances no declaration of forfeiture had been made, so that no disposition could be made of the unearned lands until some steps had been taken to replace the title in the United States. With this end in view congress passed the remedial statute of March 3, 1887.

What could have been the object of congress in adopting this statute? Only for the purpose of reclaiming the unearned lands, and at the same time to do justice to all parties that had acquired an equitable interest in the lands as settlers on the land or as purchasers from the company, and to provide for homestead and pre-emption entries that had been erroneously cancelled. It could not have been in the mind of congress in adopting this act to give the railroad company an opportunity to dispose of the lands, to say to the officers of the railroad companies: while you have no claim or interest in lands you have not earned, yet you may sell the lands, and if it appears that the parties to whom you have made sales are good faith purchasers, they will be given the lands and you may reap the benefits of the sale.

We feel confident that this court will hold that the action taken by the governor and the legislature of the State of Iowa operate as a final adjustment of the grant so as to

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except the grant in question from the provisions of the adjustment act of 1887. To ignore appellee's claim as a settler on the land long prior to appellant's purchase from the railroad company, would be unjust and inequitable, and contrary to law, and we respectfully submit that the first question submitted to this court in the certificate should be answered in the affirmative and the second in the negative.

KING & STEARNS,
Counsel for Plaintiff and Appellee.

M. B. DAVIS,
Associate Counsel.

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FILED
APR 23 1904
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

EQUITY.—233.

ELMIRA KNEPPER,
Appellant,

vs.

JOHN A. SANDS,
Appellee.

Supplemental Brief Citing Cases Referred to by Attorney for Appellee on Oral Argument and Requested by the Court.

JOHN H. KING,
Attorney for Appellee,
Huron, S. D.

C. G. Burdoyne, Walker and Centre Streets, N. Y.

In the Supreme Court of the United States.

WASHINGTON, D. C.

ELMIRA KNEPPER, Appellant, AGAINST JOHN A. SANDS, Appellee.	233 Equity

Reference being made in the oral argument to certain cases and decisions by John H. King, attorney for the appellee, as touching on the case at bar, at the request of the Court, I give below the cases referred to.

The suit of the Chicago, Milwaukee & St. Paul Railroad Company vs. The Sioux City & St. Paul Company, 117 Sup. Ct. Repts., page 406, U. S. Report, page 928, Lawyers' Consolidated Addition, wherein the Court denied the claim of the Chicago, Milwaukee & St. Paul Railroad Company to all the lands in the overlapping limits, and held that they were only entitled to a moiety of the grant, but which, in fact, took 35,000 and odd acres of the 85,000 acres withheld and unearned from the Sioux City & St. Paul grant, which was in the original grant to them from the State of Iowa.

This suit was commenced by the Chicago, Milwaukee & St. Paul Company in 1879, and was not decided until March 27th, 1886, and this land was all situated

in O'Brien and Dickinson Counties, the title to which was held by the State, as it held the title to both grants, they both being in one act, although the lands now to be given to Chicago, Milwaukee & St. Paul Company were originally in the lands granted to McGregor Western Company, but declared forfeited by the state, and the grant adjusted as to the McGregor Company and resumed by the State and regranted to the Chicago, Milwaukee & St. Paul Company.

Hence the first section of the Act of 1884 Iowa Legislature relinquished all the Sioux City & St. Paul unearned lands to the Government, but section 2 directed the Governor not to certify those in O'Brien and Dickinson Counties, although cause not recited in the section, but if the Chicago, Milwaukee & St. Paul got the lands, the Governor was to patent the same to them as they had already been patented to the State long before.

Reference was also made to the case of United States vs. Sioux City & St. Paul Company, 159 Sup. Court Reports, page 349,—in Consolidated Reports Page 177, wherein the Supreme Court held that the State had given to the Sioux City Company all the lands to which it was entitled under the granting act of 1864.

The decision of Judge SHIRAS, sitting as Circuit Judge in the trial of these cases, and the case of Sands vs. Knepper, was decided in favor of Sands on the same theory or premises as the case of Manley vs. Tow, reported in full on page 241, Vol. 110 Federal Reporter, and in addition to the general questions herein involved, I call attention to page 243, wherein the court makes special reference to the second section of the Relinquishment Act of 1884, and the exception in the second section, or the certificate section, wherein the court recites the claim or contention of the Milwaukee Company that was the cause of the exception as to the lands in O'Brien and Dickinson Counties not being certified, the intention being to close up all transactions as to the Sioux City Company.

Quotation is also made in that opinion from the Lake Superior Ship Canal & Iron Company vs. Cunningham, 155 Sup. Court Reports, page 183, the United States Reports, old book, page 385.

Judge SHIRAS also rendered an Opinion in the case of Benner vs. Lane, one of those similar cases reported on page 408 in 116 Federal Reporter, following Tow vs. Manley. Same decree was entered in Sands vs. Knepper, but I do not find it as reported, but is the same question and same class of cases.

I do not find the decision of the Secretary of the Interior filed or reported in the case at bar. The principal case upon which the Secretary decided against the Homestead claimants and reversed the Commissioner of General Land Office and the Local Land Office, in the cases of which there was a large number was Manley vs. Tow, page 504, Vol. 29; Public Land Decision, Secretary of the Interior, pages 504 to 509 inclusive.

JOHN H. KING,
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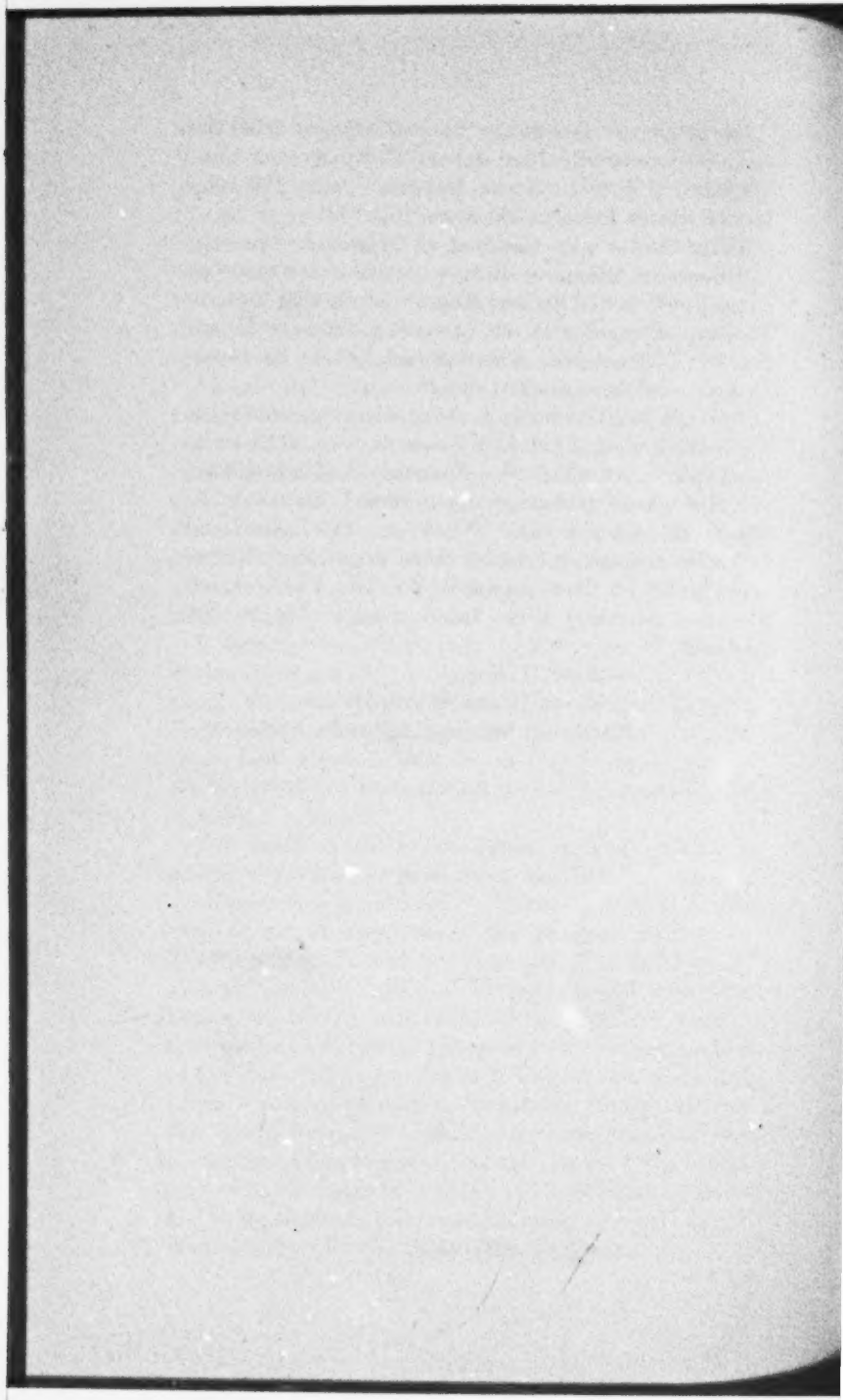
Attorney for John A. Sands, Appellee.



Supreme Court of the United States.

No. 233.—October Term, 1903.

Elmira Knepper vs. John A. Sands. } On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

[May 31st 1904.]

Mr. Justice Harlan delivered the opinion of the Court.

This cause is before us upon questions certified by the Circuit Court of Appeals pursuant to the Judiciary Act of March 3d 1891, c. 517, 26 *Stat.* 826.

The controlling facts in the extended statement sent up by the Judges of the Circuit Court of Appeals, as the basis of the questions propounded, are these:

By an act approved May 12th 1864, c. 84, Congress made a grant of lands to the State of Iowa for the purpose of aiding in the construction of a railroad from Sioux City to the south line of Minnesota at such point as the State might select—the lands to be held subject to the disposal of its Legislature, for that purpose only. Upon the completion of each section of ten consecutive miles of road it became the duty of the Secretary of the Interior to issue to the State patents for one hundred sections for the benefit of the constructing company; and so on, until the road was completed, when the whole of the lands granted were to be patented "*to the State* for the uses aforesaid, and none other." 13 *Stat.* 72, §§ 1, 2, 3.

If the road was not completed within ten years from the acceptance of the grant by the constructing company, then the lands granted and not patented were to "revert to the State" for the purpose of securing the completion of the road within such time, not exceeding five years, and upon such terms as the State should determine—the lands not in any manner to be disposed of or encumbered except as the same were patented under the provisions of the act, and upon the failure of the State to complete the road within five years after the above ten years then the lands undisposed of were to "revert to the United States." § 4.

The State accepted the grant, April 3d 1866, upon the conditions prescribed by Congress, and authorized the Sioux City and St. Paul Railroad Company, a Minnesota corporation, to construct the road. The company entered upon the work of construction, and completed only five sections of

ten miles each, receiving the full amount of land to which it was entitled by reason of such construction.

In consequence of the failure of the railroad company to complete the construction of the road, the State declared by an act approved March 16th 1882 that, in respect of all lands and rights to land granted or intended to be granted to that company, they "are hereby absolutely and entirely resumed by the State of Iowa, and that the same be and are absolutely vested in said State as if the same had never been granted to said company." Before the passage of that act the State, through its executive officers, ascertained by computation that the railroad company had received conveyances for all lands it was entitled to receive under the terms of the grant, and that the State then held legal title to 85,457.41 acres pertaining to the grant, no part of which had then or ever since been earned by the company. The land in question here was a part of those unearned lands.

Subsequently, by an act which took effect April 2d 1884, the State relinquished to the United States all its right, title and interest in the lands which by the above act of 1882 were declared vested in the State.

The land here in dispute, being section 9, township 95, north of range 42, west of the fifth principal meridian, in O'Brien County, Iowa, was open and unoccupied when the above act of April 2d 1884 was passed. In 1885 Sands settled upon it, erected thereon a house, and made improvements with a view of establishing a homestead in accordance with the laws of the United States. He has continuously since resided upon the land, claiming it as a homestead. Shortly after he settled upon it he made application to enter it as a homestead, but his application was rejected; for what reason rejected, does not appear.

Later, by an act approved March 3d 1887, Congress provided for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands. 24 *Stat.* 556, c. 376.

The first section of that act provided for the immediate adjustment, in accordance with the decisions of this court, of each of the railroad land grants which then remained unadjusted. The second section provided for the recovery by the United States of the title to lands erroneously certified or patented by the United States to or for the use or benefit of any company claiming by, through or under grant from the United States, to aid in the construction of a railroad. That section made in the duty of the Secretary of the Interior to demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits, and, if the demand was not complied with, then it became the duty of the Attorney General to institute suit against the company. The third section provided that homestead or pre-emption entries of *bona fide* settlers which were found to have been erroneously can-

celled may be perfected, upon compliance with the public land laws and certain conditions and the settler reinstated in his rights. If the settler did not renew his application within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands were to be disposed of under the public land laws—according a priority of right to *bona fide* purchasers of the unclaimed lands, if any, and if there be no such purchasers, then to *bona fide* settlers residing thereon.

The fourth section, upon the construction of which the present case mainly depends, is in these words: "§ 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented, as aforesaid, and *which have been sold, by the grantee company*, to citizens of the United States, or to persons who have declared their intention to become such citizens, *the person or persons, so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased*, upon making proof of the fact of such purchase, at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants, respectively, shall have been adjusted; and patents to the United States shall issue therefor, and shall revert back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company, which has so disposed of such lands, of an amount equal to the Government price of similar lands; and in case of neglect or refusal of said company to make payments, as hereafter specified, within ninety days after the demand shall have been made, the Attorney General shall cause suit or suits to brought against such company for the said amount: Provided, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified or patented as aforesaid from recovering the purchase money therefor, from the grantee company, less the amount paid to the United States by such company, as by this act required. . ." 24 *Stat.* 556, *c.* 376.

As showing the nature of the title of the State under the act of 1864, reference may here be made to a suit brought by the United States against the Sioux City and St. Paul Railroad Company, under which company, as will presently appear, the appellant claims. By the final decree in that case the title of the United States was quieted as to certain lands situated in Dickinson and O'Brien Counties, and claimed by the railroad company under the act of 1864. In the opinion in that case, which was decided here October 21st 1895, the court said: "Another contention is, that upon the issuing of the patents of 1872 and 1873 to the State for the use and benefit of the railroad company the title vested absolutely in the company, and the lands were thereby freed from restraints of alienation, from conditions subsequent, or from liability to forfeiture. In support of this contention reference is made to *Bybee* v. *Oregon & California*

Railroad, 139 *U. S.* 663, 674, 676–7; *Van Wyck* v. *Knevals*, 106 *U. S.* 360; *Wisconsin Central Railroad* v. *Price County*, 133 *U. S.* 496; *Desert Salt Co.* v. *Tarpey*, 142 *U. S.* 241; *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 *U. S.* 1, 6. But these are cases, as an examination of them will show, in which the grant was directly to the railroad company, or in which the act of Congress required that the patents for lands earned should be issued, not to the State for the benefit of the railroad company, but directly to the company itself. In the case now before us the statute directed patents to be issued to the State for the benefit of the company. So that, until the State disposed of the lands, the title was in it, as trustee, and not in the railroad company. *Schulenberger* v. *Harriman*, 12 *Wall.* 44, 59; *Lake Superior Ship Canal &c. Co.* v. *Cunningham*, 155 *U. S.* 372. See also *McGregor &c. Railroad* v. *Brown*, 39 *Ia.* 655; *Sioux City & St. Paul Railroad* v. *Osceola County*, 43 *Ia.* 318, 321. In the case last named the Sioux City Company was relieved from the payment of taxes upon some of the lands patented to the State for its benefit, upon the ground that the legal title was in the State, and the lands for that reason were not taxable. The question is altogether different from what it would be if patents to these lands had been issued, or if the State had conveyed them directly to that company." *Sioux City &c. Railroad* v. *United States*, 159 *U. S.* 349, 363. It was there adjudged that the railroad company had received 2,004.89 acres more than, in any view of its rights, should have been awarded to it.

After the decision of that case the Secretary of the Interior, under date of November 18th 1895, published a circular, in which he declared the land here in controversy and other like land subject to disposal by the Land Department. This was after the above application by Sands to enter this land as a homestead.

Subsequently, on the 10th of March 1896, Sands renewed his application for the land in question as a homestead. That application was contested in the local land office by the present appellant, who asserted a right to the land in virtue of a *purchase* of it *from the Sioux City and St. Paul Railroad Company on June* 21st 1877, and in virtue of the provisions of the fourth section of the above adjustment act of March 3d 1887. She had never resided upon the land in controversy or cultivated the same or in any manner attempted to comply with the homestead laws of the United States for the purpose of obtaining a title under them. This contest was determined at the local office in favor of Sands—that office finding that he had, by virtue of his settlement of and continued residence upon and cultivation of the land, and by full compliance with the homestead laws of the United States, become entitled to a patent. That decision was confirmed by the Commissioner of the Land Office. But upon appeal to the Secretary of the Interior the decisions of the local land office and of the

Commissioner were reversed, and Sands' application to enter the land as a homestead was rejected. Thereupon the present suit was commenced by Sands, charging that the officers of the General Land Office, proceeding under the decision of the Secretary, were about to issue or had issued a patent to the present appellant solely in virtue of her alleged purchase on June 21st 1887 from the Sioux City and St. Paul Railroad Company, after the passage of the adjustment act of March 3d 1887 and in virtue of its fourth section. Sands, alleging that such action, if taken, would be unlawful and contrary to law, prayed that the Commissioner be required to accept his proofs showing settlement upon and continuous cultivation of the land for the period of five years or more, and that the patent to appellant Knepper be either declared null and void, or for a decree declaring that she holds the legal title in trust for him.

Such is the case made by the statement by the Judges of the Circuit Court of Appeals, who propound to this court the following questions:

"First. In view of the provisions of the act of Congress of May 12th 1864, by virtue of which the land in controversy was granted to the State of Iowa, did the action which was subsequently taken in manner and form aforesaid by the Governor and Legislature of the State of Iowa operate as a final adjustment of the grant, so far as the Sioux City and St. Paul Railroad Company was concerned, and, by virtue of its being so adjusted, exempt or except the grant in question from the provisions of the adjustment act of March 3d 1887?

Second. In view of the terms of the granting act of May 12th 1864, and the action subsequently taken in manner and form aforesaid by the State of Iowa, acting through its Governor and Legislature, can Elmira Knepper, the appellant, be esteemed a purchaser in good faith or a *bona fide* purchaser of the land in controversy, within the meaning of the fourth section of the adjustment act of March 3d 1887, as against John A. Sands, the appellee, who was in the open possession of the land in controversy and had erected valuable improvements thereon, in manner and form aforesaid, when said purchase was made?"

We have seen that the appellant claims an interest in the lands here in question in virtue of a purchase made by her from the railroad company, June 21st 1887, *after* the passage of the adjustment act of March 3d 1887. But what interest had the company at that time in these particular lands constituting a part of the 85,457.41 acres of unearned lands, no part of which the company earned or could have earned except on account of road actually constructed by it. For such road as the company had constructed, lands had been conveyed to it, and there never was a moment, according to the record, when the company could have rightfully demanded from the State a conveyance or patent for the lands here in dispute or for any of the unearned lands. The legal title to the lands granted by the act

of 1864 was, first in the United States, next in the State, (*Sioux City &c. Railroad Co.* v. *United States, above cited,*) but never in the company until a conveyance to it by the State. The State could only have conveyed lands to the company in consideration of constructed road; and subject to that condition the company undertook to construct the road. When it abandoned the work of construction it lost the right to claim lands except for such road as it had previously constructed. The State therefore properly resumed, as by the act of 1882 it did resume, after the company's default, such title to the unearned lands as it had before authorizing the company to construct the road. The State after thus resuming the title could have used the unearned lands to aid in the construction of that portion of the road which the railroad company failed to construct. But it did not do so, and hence by the act of April 2d 1884—eighteen years after it accepted, in 1866, the grant of 1864 and the completion of the road having been abandoned—the State, by statute, formally relinquished to the United States all its right, title and interest in the unearned lands pertaining to the Sioux City and St. Paul Railroad Company. This statute was perhaps unnecessary, as by the act of 1864 the title to the unearned lands granted by that act was to revert to the United States after the expiration of fifteen years from the acceptance of the grant without the completion of the road. But the relinquishment by the State saved the necessity, if there was a necessity, of formal proceedings, legislative or judicial, by the United States to reinvest to itself with full title. Thus the title to the unearned lands was put back into the United States. So that when the adjustment act of 1887 was passed, the title of the United States to the unearned lands, including the particular lands here in dispute, was complete and perfect. No interest then remained in the State or in the railroad company requiring an adjustment; for, as stated, the State had relinquished all its claim, and the railroad company had received all the lands it was entitled to demand for constructed road. When, therefore, Congress made provision in the fourth section of the act of 1887 for the protection of those who in good faith had purchased from any "grantee company," to whom lands had been erroneously certified or patented, it could not have intended to refer to purchases made from the railroad company, after that act took effect, of lands originally certified or patented to the State and not to the railroad company, and the legal title to which was in the United States at the date of the passage of the act. A chief purpose of the act of 1887 was to declare forfeited unearned lands and restore them to the public domain, and not to give third parties and speculators an opportunity to purchase such lands from companies which had defaulted in the work of construction, and to whom the State had never conveyed, and thereby obtain a preference over actual settlers in possession. The policy of the Government has always been favorable to actual settlers. As late as *Ard* v.

Brandon, 156 *U. S.* 537, it was said that "the law deals tenderly with one who in good faith goes upon the public lands with a view of making a home thereon." See also *Northern Pacific Railroad* v. *Arnacker*, 175 *U. S.* 564; *Moss* v. *Dowman*, 176 *U. S.* 413; *Rector* v. *Gibbons*, 111 *U. S.* 276; *Nelson* v. *Northern Pacific Railway*, 188 *U. S.* 108, 123.

We are of opinion that the fourth section of the adjustment act of 1887 has no reference to any unearned lands purchased after the date of that act from a company to whom they had never been certified or patented, although, if it had kept its engagement with the State and completed the road, in due time, it could have acquired an interest in them; and that, as the State by legislative enactment, had resumed the title it acquired from the United States, and afterwards relinquished its interest to the United States—all before the passage of the adjustment act—the appellant could not, within the meaning of the act, and after its passage, have become a purchaser in good faith of the lands here in dispute. The sale by the railroad company to the appellant was a sale of something it did not possess, a mere device to bring its purchaser within the provisions of the adjustment act of 1887 when that act was never intended to apply to such a case.

We, therefore, answer the second question in the negative, and omit as unnecessary any answer to the first one.

It will be so certified.

True copy.

Test:

Clerk Supreme Court, U. S.